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91-1405

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1991

OPTIMAL DATA CORPORATION, PETITIONER

Vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTORIARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTORIARI

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QUESTIONS PRESENTED

1.0 Whether Documentary Abuse of Discretion with discriminatory treatment of disadvantaged minority contractors is the cause of the long endured detriment and suffering by Petitioner, Optimal Data Corporation (Optimal) and its principal, Dr. Lincoln Teng*, whose contract cost had been under intrinsic practice of altruistic management with proven cost consciousness and technical conscientiousness. Specifically, whether Petitioner's constitutional rights under Amendments V and XIV are violated due to lack of due process of law caused by certain documentary actions and/or inactions of the contracting agency (NASA-GSFC), Board of Contract Appeals (NASA-BCA), and, even the lower courts as presented in the following questions, 1.1, 1.2, 1.3, and 1.4:

1.1 Whether NASA-GSFC, the contracting

agency, had acted with Documentary Abuse of Discretion[1], specifically in exerting discriminatory mistreatment of Petitioner, Optimal and its principal, Dr. Teng, under subject contract.

1.2 Whether the Board (NASA-BCA) had acted with Documentary Abuse of Discretion, especially in Judge Dicus' judicial conflict of interest, with corroborating evidence of discriminatory bias against Petitioner, Optimal and its principal, in favor of GSFC, who earlier had Dicus' counselship, even on Optimal contract.

1.3 Whether the U.S. Claims Court acted

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[1] Documentary Abuse of Discretion: The action of Abuse of Discretion via the use or over-use of documents to effect the abuse of discretion, while causing the other's use of documents ineffective orimpossible, all to the detriment of others by means of delay - and - deny tactics, caprice, fraud, errors, and culminating to the discriminatory prejudice against minorities.

with Documentary Abuse of Discretion with prejudice, especially in granting Defendant's motion (in 1986) to suspend a pretrial, let alone any De Nova trial; and, after ordering for settlement of the case from a 4-year review (1985-1990 by Judge Gibson), but entered "affirmed" of BCA's extremely biased decisions (by Judge Hodges, June 1990 to January 1991), ironically favoring Appellee who even refused the Court's "settlement" order.

1.4 Whether the Appeals Court for Federal Circuit acted with Documentary Abuse of Discretion and with discrimination, particularly in determining the case not deserving of oral argument (a pseudo due process), and with caprice in giving notice for decision to be made on the Briefs, while rendering a decision of "affirmed" with no opinion at all, and with arbitrary prejudice in returning

Amicus Curiae's Brief with submissions of the most crucial Affidavit by Dr. Wolter, and CPA Thrailkill's memorandum, inhibiting truth and justice.

* Dr. Lincoln Teng, a U.S. citizen for 40 years, served U.S. Forces in China Theater in 1945, under the aspiration of the gallantry and selflessness of servicemen, and Confucius' teaching of altruism, and the Christianity as a Baptist (1945), especially inspired by the NASA Cost Reduction Program in 1969, Dr. Teng has been intrinsically in the practice of altruistic management on government contracts.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V: "No person shall be held to answer for..., nor be deprived of life, liberty, or property, without due process of law;" (legal, judicial, and governmental fair play) "nor shall private property be taken for public use, without just compensation."

Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,...., than according to the rules of the common law.

Amendment XIV Section I: " All persons born or naturalized in the United States, ..., nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE OF MINNESOTA CONSTITUTIONAL PROVISIONS INVOLVED

State of Minnesota Restructured Constitution,Art.2,Rights and Privileges, Sect.2: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers...."

STATUTES INVOLVED

1. 41 U.S.C. S 321-22 Wunderlich Act
2. 28 U.S.C. S 1295(a)(3) (1988)
3. Small Business Act, 15 U.S.C. 637(a) (1988) P.L. 85-536, Sect. 8(a)
4. Clause 172, Parag. (g)

PARTIES TO THE PROCEEDINGS

Petitioner - Optimal Data Corp. and its principals, Drs. Lincoln Teng, and E. Bruce Lees, Residence Director in the state of Minnesota. There is no parent company nor subsidiaries.

Respondent - U.S.A., NASA-Goddard Space Flight Center, contracting agency, NAS 5-21491; Small Business Administration, prime contractor, SB-424-8(a)-73-C-225.

REFERENCE TO OPINIONS BELOW

All references to opinions below appear in Petition Appendix, Category I, Mandatory Documents, Papp.1-21.

JURISDICTION STATEMENT

The statutory basis for jurisdiction: (1) the Wunderlich Act 41 USC S 321-22; (2) 28 USC S 1295 (a)(3)(1988); (3) Federal Law Section 8(a) Small Business Act, 15 USC S 637(a)(1988) (including SBA-SOP for 8(a) contracting); and (4) Clause 172(g).

TABLE 1 TABLE OF CASE CITATIONS

1. S.J. GROVES & SONS CO. AND JASPER CONSTRUCTION CO., Plaintiff, v. FULTON COUNTY U.S. DEPT. OF TRANSPORTATION, Defendant, 920 F 2d 752 1991 U.S. ANW.

2. CITY OF ROCHESTER v. U.S. ENVIRONMENTAL PROTECTION AGCY, 496 F Supp. 751.

3. FULLJLOVE ET AL v. KLUTMICK SECRETARY OF COMMERCE ET AL,No.78-1007,U.S. Supreme Court, 448 U.S. 100 S Ct 775R 1980 US.

4. MANEKAS v. ALLIED DISCOUNT CO. 6 Misc. 2d 1079, 166 NYS 2d 366, 369

5. ELDER v. ANDERSON 205 Cal. App. 2d, 326, 23 Cal. RPTR 48,51.

6. BURGDORS v. FUNDER, 246 Cal. App. 2d, 443, 54 Cal. RPTR 805.

7. NEW YORK SHIP-BUILDING CO. V. U.S. ASBCA No. 16164, June 1978.

8. RAMSEY, ET AL. V. U.S. No. 50010 U.S. Ct. Cl., December 1981.

Preceding Cases of Categorized Issues: Added cost under CPFF with LOC, constructive change order, Appellee's breach of contract and bad faith conduct, presented in BFA, p.47-48, and RBFA, p.19-20.

Note: Petitioner's LEXIS computer search has selected the above cases for honorable court's review. Petitioner is, as yet, the first and only case involving altruistic management.

TABLE 2 TABLE OF ACRONYMS AND ABBREVIATIONS

AA = Appellant Affidavit
ACO = Administrative Contracting Ofcr
Adju. or Adjud. = Adjudicated
AF = Appeal File
Apls.Ct. = Appeals Court
Apls.Ct.Fed = Appeals Court Federal
Aplt = Appellant
APP = Appendix
APP.# = Appendix page #
APPL'EE = Appellee
APPL'NT = Appellant
Appls. Ct. = Appeals Court
ATTP = Attachment Page

BCA = Board of Contract Appeals
BFA = Brief for Appellant

CCD = Contract Cost Data Sheet
Cl.Ct. or CL. Ct. = Claims Court
CPA = Certified Public Accountant
C.O. = Contracting Officer
CPFF = Cost Plus Fixed Fee
CPIF = Cost Plus Incentive Fee
Cy = Calendar Year

DAD = Documentary Abuse of Discretion
DCAA = Defense Contract Audit Agency

FOF = Findings of Fact

G/A or G&A = General and Administrative
Gov't = Government
GSFC = Goddard Space Flight Center

LOC = Limitation of Cost
LOCC = Limitation of Cost Clause
Ltr = Letter

MAP = Mandatory Attachment Page

Memo = Memorandum
Mod. = Modification
Mtg. = Meeting

NASA = National Aeronautics and Space Administration
No. or # = Number

ODC = Optimal Data Corporation
Ofc = Office
Ofcr = Officer
O/H = Overhead
Optimal = Optimal Data Corporation

P. = Page Number
PAPP.# = Petition Appendix Page #
Para. = Paragraph
PHCF = Pre-hearing Conference File
PLT = Plaintiff
Proj. = Project

R-29 = USSC Rule 29
R-App = Respondent Appendix
RBFA = Reply Brief for Appellant
R-Brief = Respondent Brief

SAF = Supplementary Appeal File
SBA = Small Business Administration
SECT. = Section
SET = Systems in Education and Training, Inc. (SBA Consultant)
SMB = Small Minority Business
Supp. = Supplement or Supplemental

Tab. = Tabulation
TFOF = Truthful Findings of Fact
T.O. = Technical Officer
T.O.C. = Table of Contents

USSC = United States Supreme Court

QUESTIONS PRESENTED Passim 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED v

PARTIES TO THE PROCEEDINGS, PARENT CO./SUBSIDIARIES vi

STATEMENT OF JURISDICTION vi

TABLE 1: TABLE OF CASE CITATIONS vii

TABLE 2: TABLE OF ACRONYMS AND ABBREVIATIONS viii

TABLE OF CONTENTS x

SECTION PAGE#

I. STATEMENT OF THE CASE

(a) Nature of the Case 1

(b) Course of Proceedings and Disposition in NASA-BCA, U.S. CL. Ct. and Apls. Ct. for Federal Circuit 2

II. SPECIAL AND IMPORTANT REASONS FOR THE PETITION

(a) Documentary Abuse of Discretion Against Disadvantaged Minority Contractors in Defying Equal Access to 6

Justice Act to Its Obsolescense - A Violation of Amendment XIV.

(b) Documentary Abuse of Discretion in Denying Altruistically Managed Cost in Minority Contracts, Causing Severe Injustice and Inequity in Violation of Amendments V and XIV. 7

(c) The Practice of Altruistic Management by Minorities Being Intrinsically Under the Aspiration of True Americanism - Deserving Protection and Promotion by Honorable Court 8

(d) The Unique Contract Cost Reporting Instrument, CCD, in the Practice of Altruistic Management - Deserving Honorable Court's Recognition for Application to Cost Control of All Contracts 9

III. EVIDENCE OF DOCUMENTARY ABUSE OF DISCRETION AGAINST PETITIONER, A DISADVANTAGED MINORITY CONTRACTOR - IN VIOLATION OF AMENDMENTS V AND XIV

(a) Specific Evidence of Documentary Abuse of Discretion by U.S. Court of Appeals for Federal Circuit (Case No. 91-5070) 11

(b) Specific Evidence of Docu- 18

mentary Abuse of Discretion
by U.S. Claims Court
(Case No. 760-85C)

(c) Specific Evidence of Documentary Abuse of Discretion (DAD) by NASA-BCA, Especially Appeals Judge Dicus (No. 976-8) 34

(d) Specific Evidence of Disriminatory Mistreatment of Petitioner During and After Contract Performance by Contracting Agency, NASA/GSFC 44

IV. SUMMARIZATION AND CONCLUSION 57

(NOTE: Re use of the Appendix) 64

PETITION APPENDICES (J)1-5

SECTION I. STATEMENT OF THE CASE

(a) Nature of the Case:

The case involves Petitioner, Optimal Data Corporation (Optimal or ODC) and its principals, Drs. Lincoln Teng and E. Bruce Lees, under the minority 8(a) contract (SB-424-8(a)-73-C-225) with SBA as prime contractor for subject contract NAS5-21941 with NASA-Goddard Space Flight Center (GSFC). GSFC's discriminatory mistreatment compelled Optimal to appeal to NASA-BCA. Whereas, the Appeal Judge Dicus, a former legal counsel of GSFC, with corrobating evidence of BCA's bias, caused further documentary abuse of discretion against the disadvantaged minority by U.S. Claims Court and Appeals Court for Federal Circuit. The Petition for Writ is under the Jurisdiction Statutes and U.S. Constitutional Provisions (p.v & vi), especially in application of Amend-

ments V, XIV, and VII of the United States Constitution via the Reconstructed Constitution of the State of Minnesota of which Petitioner, Optimal Data Corporation, is a member with good standing as certified. In addition, Dr. Teng* and Dr. Lees, with abiding faith in the American system, do claim their constitutional rights for their ownership of this corporation, of which they are being deprived due to the delay/denial of the Reimbursement Claim.

(b) Course of Proceedings and Disposition in NASA-BCA, U.S. Claims Court and Appeals Court for Federal Circuit:

The case is brought before the Supreme Court on appeal from a judgement without opinion issued by the Appeals Court for Federal Circuit on November 12, 1991 (Papp.1). The October 31, 1991 court notice informed of "cancelling oral

argument for not deserving one," with further notice that the decision would be made on Briefs, and later, capriciously making no reference to the Briefs in its arbitrary decision without opinion (Papp.3). The Appeal to Appeals Court for Federal Circuit stemmed from U.S. Claims Court's decision of January 30, 1991 (Papp.15), by Judge Hodges, who prejudicially favored colleague BCA Judge Dicus, and advocated, rather than chastised, Appellee for refusal of settlement order by Judge Gibson (reviewed case 1985 to 1990, Papp.7). The U.S. Claims Court Appeal followed NASA-BCA's denial of Optimal's Claims I, II, III and V, remanding Claim IV to GSFC Contract Office (regarding 1975 overhead (O/H)), whereas the 1975 direct labor and direct cost in Claim III were denied, implying a capricious act because Claim IV is a percent-

age of Claim III. Furthermore, derivations for the claimed unpaid balance of $137,000 (1/3 of total cost for a 2 1/2 year 4-man project) had been completely ignored by Government's documentary abuse of discretion, exerting discriminatory treatment of Petitioner by pre-determining its former counsel, Dicus, as the Board Judge on the Appeal, so as to impede Optimal, a disadvantaged minority contractor in practice of altruistic management (evidential delineations in Section III (a)-(d)).

* Dr. Lincoln Teng, as project key personnel, project director, charged direct labor at minimum wage of $2.25 per hour for 7 stipulated tasks performed in 1975, during and after the completion of the PLACE realtime software system. These charges were presented in Claim III and unjustly denied by NASA-BCA Judge Dicus by calling director Teng the "president" of the corporation.

SECTION II. SPECIAL AND IMPORTANT REASONS FOR THE PETITION

The Special and Important Reasons for granting Certiorari are presented in 4-stages in paragraphs (a) through (d) herein below. The bases for these are: 1/.NASA-GSFC's discriminatory treatment, including illegal conduct (III(d),p.44); 2/.Judicial defectiveness due to NASA-BCA Judge's conflict-of-interest violation (III(c),p.34); 3/.Defying of Claims Court Order for Settlement (III (b), p.18); 4/.Appeals Court for Federal Circuit's cancellation of oral argument with a notice for decision to be made on briefs, while arbitrarily "affirming" without referring to briefs at all (III(a),p.11).

Based on the above, Petitioner's chance of due process has been impeded and Petitioner's claim for altruistic minority contract cost denied, in violation of Amendments V & XIV.

(a) Documentary Abuse of Discretion (DAD) Against Disadvantaged Minority Contractors in Defying Equal Access to Justice Act to Its Obsolescence -- A Violation of Amendment XIV:

The evidential Documentary Abuse of Discretion against Petitioner (III (a)-(d)) is depicted by the sharp contrast of superior knowledge and infinite resources versus disadvantaged minority businesses with nil resources nor any legal force. When there is no trial, jury, arbitrators, nor public exposure of the indiscretion, then the truth can be obscured and justice obstructed. This Petition seeks rectification of such a vast documentary abuse of discretion against disadvantaged minority contractors. If honorable court would grant the writ in a Landmark decision, the objective of the Equal Access to Justice Act will then be

realized; thus, the victimizing of disadvantaged minorities would cease and their Constitutional rights upheld.

(b) Documentary Abuse of Discretion in Denying Altruistically Managed Minority Contract Cost, Causing Injustice/Inequity In Violation of Amendments V and XIV:

In Instant Case of Documentary Abuse of Discretion, the records disclosed evidence of excessive fraud by the government to impede Optimal (III (c),(d)). As a minority contractor, Optimal's intrinsic practice of altruistic management exemplified technical conscientiousness, as well as cost consciousness. The government's denial of such conscious cost had caused injustice and inequity in violation of Amendments V and XIV. Moreover, such exemplified altruism by a minority contractor is of special significance to our inflationary economy today.

By granting the Petition for Writ, the greatest interest of the nation can be served, while rectifying the discriminatory injustice and inequity suffered by altruistic minorities among the class of DAD victims, especially in government contracting.

(c) The Practice of Altruistic Management Being Intrinsically Under the Aspiration of True Americanism (Prologue IC, App.106-111; App.51-52) -- Deserving Protection and Promotion by the Honorable Court.

Petitioner's practice of altruistic management is intrinsically under the aspiration of true Americanism as preached by the late President Kennedy, "What you can do for your country..." to all Americans, and by Justice Thomas for self-reliance to minority Americans -- the essence of true Americanism for an

ever-lasting optimum prosperity with a stable free economy in a harmonious society with justice and equality for all.

(d) The Unique Contract Cost Reporting Instrument, CCD, in the Practice of Altruistic Management deserving Honorable Court's Recognition for Application to Cost Control of All Contracts:

As the record disclosed, (Papp.34 & App.24-25), Optimal designed the unique Contract Cost Reporting instrument, Contract Cost Data (CCD) sheet, which demonstrated the altruistic management system under Optimal's Doctrine of Small Business Operations. Such a unique cost reporting instrument can also be used for cost monitoring, pre-auditing, and control in preventing cross-charges and any fraudulent temptation, if the report is certified by the supervisor in charge. Consequently, a nation-wide application

of CCD on all government contracts can help save government costs in billings. As for subject contract claim, GSFC concealed copies of CCD from Appeal File; BCA Judge prejudicially ignored the existence of it so as to aid his DAD denial of Optimal's claim. Such unconscionable DAD against the minority contractor in the denial of its conscious cost under altruistic management, with its unique cost control instrument, must be of deep-rooted discrimination in a serious violation of Amendments V and XIV.

In conclusion, DAD in the realm of government contracts can be counteractive to the government because big businesses with abundant resources and extensive legal forces can litigate on government expense creating unworthy claims. Therefore, DAD mistreatment is mainly concerned with disadvantaged Americans, pre-

dominately small minorities, particularly those in practice of, or with strong conscience for, altruistic management. An ultimate and effective resolution to the DAD discrimination against disadvantaged minority contractors relies on Honorable Court's grant of this Petition for Writ, i.e., a historical landmark decision to inspire a DAD Amendment to the Equal Access to Justice Act to provide justice to a major class of victims.

SECTION III. EVIDENCE OF DOCUMENTARY ABUSE OF DISCRETION AGAINST PETITIONER, A DISADVANTAGED MINORITY CONTRACTOR IN VIOLATION OF AMENDMENTS XIV AND V. (PAPP.15, ET AL)[1]

(a) Specific Evidence of Documentary Abuse of Discretion by U.S. Court of Ap-

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[1]PAPP (Petition Appendix), MAP (Mandatory Attachment Page), APP (Appendix), ATTP (Attachment to Reply Brief), BFA (Brief for Appellant), RBFA (Reply Brief for Appellant).

peals for Federal Circuit (Case No. 91-5070):

(1) Regarding the Court decision of November 12, 1991 (PAPP.1,3,4):

The Appeals Court's "Affirmed" decision was arbitrary because it was rendered without opinion, let alone any reference to the Briefs, as the Court so notified 12 days earlier. (Papp.1,3,4)

(2) Regarding the Court Notice for Oral Argument (Papp.2-3):

The case had been scheduled for oral argument on November 6, 1991, at 10:00 a.m.; information for Appellant's counsels to appear for argument was submitted October 17, 1991. Then, on October 31, 1991, the Court served a notice for removing the case from oral argument schedule by prejudicially determining the case as "not deserving oral argument (Pseudo Trial)". This is concrete evidence of a

discriminatory act against Optimal by the Court in denying a Pseudo Trial for the case, let alone any De Novo trial. Thus, the Court's arbitrary decision is evidentially lacking Due Process in violation of Amendment XIV. In the same notice, the Court stated "...decision will be made on the Briefs," therefore, it is a capricious act by the Court to render a decision without making reference to the Briefs, detrimentally affecting Optimal's reimbursement claim -- a violation of Amendment V. In fact, after Appellant's Reply Brief completely debunked Appellee's contentions, Appellee's counsel could not face the argument in sincerity, and apparently influenced the Court to cancel it. Thus, the decision is of discriminatory prejudice, again, in violation of Amendment XIV.

(3) Regarding Return of Amicus

Curiae's Submissions:

The required form and procedure for Amicus Curiae's Brief together with Motion for Leave, as instructed (R29), were followed with extreme prudence. The usually required (3) copies were submitted. Even if insufficient, as the reason stated, the Clerk Office usually requests additional copies as needed without returning the submission. In this case, the Appellee's counsels had privately communicated directly with the Court and influenced the Court about schedules, and, of course, the return of Amicus Curiae's submissions. In fact, for months Appellee's counsel had not responded to Appellant's request for his consent to Amicus Curiae's submission of crucial evidence for justice. Thus, justice has been obstructed by Appellee with a coordinated effort of the Court in

violating Petitioner's right of Amendment V. Such a peculiar manner by which these submissions were returned was detrimental to the Petitioner, a discrimination against this minority contractor in violation of Amendment XIV.

(4) Distinctive Unfair Treatment of This Minority Appellant In the Court Office Routines:

In the Appeals Court Clerk's Office routines, all of the government counsel's requests were promptly processed; whereas, Appellant's requests never were, especially concerning the submission of Reply Brief and Appendix. The Clerk's Office had earlier instructed both parties to submit a joint Appendix. Appellee's irresponsiveness to the joint submission caused Appellant to request an approval for submitting the Reply Brief and Appendix on the Appendix due date.

which was 7 days from the due date for Reply Brief submission. Such a request in a Motion had been pending Judge's approval, which was not received until the due date. Had Appellant not foreseen the Court's discriminatory procrastination, and not proceeded with the submission ahead of Court's reply, its Reply Brief would have missed the due date, and the case self-demised. Again, this is iron-clad evidence of discriminatory treatment of the disadvantaged minority by the Court's action and/or inaction in documentary abuse of discretion. This is another obstruction to fair play suffered by Appellant, even in routine proceedings -- a violation of Amendment XIV.

In conclusion, the above delineated (4) events are exemplified evidence of documentary abuse of discretion (DAD) against Petitioner, particularly, the

return of Amicus Curiae's submission of Dr. Wolter's Affidavit, proving NASA-BCA Judge Dicus' conflict of interest for his former counselship and even direct involvement in GSFC on Optimal's contract. Thus, the case has been suffering from judicial defectiveness from the onset of the proceedings. Petitioner's right of due process had been repeatedly denied by government's compounded documentary abuse of discretion (DAD) in violation of Amendments XIV and V. In respect to the concern with Court efficiency, and, the prolonged suffering by the disadvantaged minority Petitioner, as futilely pleaded in Reply Brief with a Foreword Pleading, which was unfortunately totally ignored, Petitioner respectfully reiterates such solemn pleading herein below:

> "1. Appellant has been compelled to present evidence of implied bad-faith conduct as required by the legal proceedings while not

having made any claim based on such conduct. Appellant will self-constrain the presentations of evidence, derivations, corroboration, and proofs which should not be misconstrued as a contention for any non-altruistic compensation, not even for the listed unfunded constructive tasks, while prayerfully determined to the altruistic claim in Instant Appeal.

2. Appellant self-proclaimed altruistic management as being of intrinsic determination since NASA's Cost Reduction Program of 1968. If any evidence of pretense in the practice of altruistic management is found, Appellant will accept penalty as if committed a fraud. Appellant prays to honorable Court for prudent examinations of fraudulent conduct in the proceedings, and, to dismiss the contention of violating party(s) for maximizing efficiency of the Court."

(b) Specific Evidence of Documentary Abuse of Discretion by U.S. Court of Claims (Case No. 760-85C):

(1) Regarding Court Order for Settlement of the Claims: Judge Gibson's order for settlement met Government's Refusal via a letter from its counsel, Kijewski (Papp.6-7 & 17): In late 1985,

Petitioner finally appealed to the U.S. Claims Court from NASA-BCA's decisions in which the denial of Reconsideration and Rectification Appeals ended in December 28, 1979 (Papp.18). In the Claims Court, Judge Gibson, with rather good conscience in his diligent review of the case for a total of (53) months, gave orders for teleconferences and, in particular, an order for settlement, which unfortunately Appellee instructed its attorney to respond that grounds do not exist for this case to be settled. Attorney Kijewski then resigned and the counsel position was filled by Ms. K. Day, Esq.[2]. By the

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[2]Ms. K. Day succeeded Mr. Kijewski (1985-1988) as counsel. In a July 1989 teleconference, Ms. Day told Judge Gibson she had received 38 pages of pleading in Dr. Teng's handwriting. This is impossible because there could not be any handwritten pages by anyone from Optimal. Ms. Day's insinuation was to attack the minority, Teng, and to express her discrimination and influence over Judge Gibson. (Record of July 1989 teleconference.)

usual rule of Judge's fair play, the Appellee, who refused to comply with Judge Gibson's order for settlement, should be subject to a judgement in favor of the innocent party, Appellant. Judge Gibson had concern for minorities but hesitated to make a just decision to avoid provoking the court's "superior prominence", which would not allow rendering the really disadvantaged minorities with a favorable or minimal just judgement in such a high court. Such discrimination in the high court's decisions, especially versus the government, had already been a customized pattern, of which a great reform is required of Supreme Court's review and Congress' action.

(2) Regarding Court's granting Appellee's Motion to Suspend Pre-Trial with (7) Itemized Requests (Papp.8-9,10-13): On August 25, 1986, Defendant Counsel

submitted a Motion to suspend pre-trial proceedings, including (7) itemized requests as exhibited in the Appendix, Papp.8-9,10-13. Plaintiff had not given the legally required consent to this Motion, let alone some of the (7) itemized requests that are to Plaintiff's disadvantage. As a rule, Plaintiff should have been given a fair opportunity to consent or to object to the Court on such requests with a Motion. Such an unfair play by both the Court and government together evidenced compounded prejudice with discrimination against the minority contractor, Optimal, by preventing any possibilities of due process at all. As a minority contract claimant, Petitioner's constitutional rights to Amendments V and XIV are being breached by the government with aid even from the Court.

(3) Regarding Court's Decision of January 30, 1991, by Judge Hodges (Papp.15, BFA MAP.3)[3]:

(i) Judge Hodges defied Judge Gibson's order for settlement: Judge Hodges' quick decision, an (8) month effort, had not continued from Judge Gibson's 4 and 1/2 year review, and even defied earlier court order for settlement. This is concrete evidence of Judge Hodges' caprice in the basic judicial procedures corroborated by his arbitrary decision, which displayed bias favoring Appellee with discrimination against the minority contractor. Moreover, the Appellee in Judge Hodges' favor is actually the guilty party because of its refusal

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[3]PAPP.15 (Opinion of Cl. Ct. Decision by Judge Hodge's submitted in Brief for Appellant to Apls.Ct.#91-5070; Facts, MAP. 4-6, Discussion, MAP.6-10, Conclusion, MAP.11, Concurrence by BCA Chrmn. Lees, MAP.12-14.)

of the settlement order of the Court (Papp.6-7). Whereas, Appellant is really the innocent party. Such an unfair play of extreme discrimination is in violation of Amendments XIV and V.

(ii) Judge Hodges' discussion with Dicus about bias: As Judge Hodges stated, Dicus denied his bias. Such denial had to be self-serving. Furthermore, such a discussion was exceptionally irregular since both parties' attorneys were not present, as legally required. (Papp.15 & note MAP.6-7)

(iii) Judge Hodges over-compounded errors by advocating BCA's already compounded errors: In FOF.32, BCA Judge Dicus made a three-fold compounded error, including an elementary arithmetic error in FOF.32, as rectified by TFOF.32 on page 32 in Appellant Brief. Judge Hodges heartlessly regarded the evidential rec-

tifications of BCA's FOF.32 errors, with simple arithmetic derivations, as arguments. After recognizing that Optimal's altruistic formula yields a lower burden to the government, he then prejudicially disregarded the fact that Optimal's refund of G&A surplus due the government is, in itself, Substantial Evidence as called for by the Court (Papp.15, MAP.8). Judge Hodges further compounded the error by misconstruing "inclusion of overhead (O/H) in the G&A formula" as inclusion in the billing, thereby alleging "Optimal's O/H was recovered twice" (Papp.15,MAP.8). Such an over-compounded error cannot possibly be committed on contract cost disputes by an authority Judge of a high court, especially the Claims Court. (Papp.15, MAP.8)

(iv) Judge Hodges' Conclusion of Law: Judge Hodges' Conclusion of Law

dwelled on over-misinterpretation of Clause 172 (g)[4] by advocating BCA Judge Dicus' misinterpretation of same (Papp.15, MAP.11): Judge Dicus' misinterpretation consists of (3) parts as follows: "...1./ Appellant treats the Clause like a blank check; 2./ the cost must first be allowable; 3./ there is no such provision, as... " These misinterpretations had been debunked in early proceedings (BFA TFOF.32, p.32) and are summarized as follows:

1/ The claim for reimbursement balance has rigorous derivations, and

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[4]Clause 172 (g): Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by reference, designating services to be performed or materials to be furnished by the Contractor at his expense or without cost to the Government.

CPA's accounting, etc., can never possibly be considered a blank check; 2/ Auditors disallowed the $6,000 interest cost and $39 contribution; no other costs were disallowed. Moreover, the intermittent funding gaps make it impossible for any unallowable funds; 3/ If Judge Dicus was referring to not finding this clause in the initial contract, as was noted during the proceedings, "Supreme Clause", Clause 172 (g), is contained in Mod.3 of the contract.' Hence, statements 1/ and 2/ are incongruous with statement 3/.

(v) The Specific Legal Support for Claims I-V as Disregarded by Judge Hodges: Judge Hodges' complete disregard of Specific Legal Support for Appellant Claims (Papp.15,MAP8-10) is presented on p. 46-48, IV (b), of BFA, and on p. 21,

IV (b) of RBFA. In addition, all of the cases cited by Judge Hodges are of different businesses, irrelevant issues, none can belong to the small minority business, and, therefore, all are inapplicable (MAP.4). The "affirm" of BCA's decision caused the "remanding of Claim IV", technically contradicting the "order for recovering a counter claim" ($19,063). Such a counter claim, as records disclosed with proofs, was based on DCAA's fraudulent report (Papp.22-25 and APP.22,31). All are completely illogical actions: insisting on incorrectly using the term "fixed price" for "fixed rate" contract, only to foster false accusations; persistent misuse of OverRun in new tasks/performances so as to deprive the contractor of fixed fees and/or to delay-denial of the funding, and, unfairly requiring the cost to be subject

to LOC; arbitrarily forcing the use of the inequitable O/H in the fraudulent report, with gross errors, to forcefully dispute the equitable O/H, while capriciously citing in FOF.58 NASPR15 201-203 to show in pretense equitable allocation of O/H which BCA totally defied. Judge Hodges advocated all of the previously committed distortions, caprice, and gross errors made by BCA Judge Dicus, as delineated with derivations and proofs in all early proceedings even with (9) prologues (App.101-119), in particular, BFA and RBFA, recently submitted to Appeals Court for Federal Circuit.

(vii) Judge Hodges Advocating BCA Judge Dicus' Bad-Faith Misconduct in Discrimination Against Minority, Optimal and Teng (Papp.15,21 & MAP.7-8):

Petitioner, as Appellant, has always been required to prove the decision "ar-

bitrary, biased, with caprice, fraud, or errors so gross as to imply abuse of discretion; or the decision not substantiated..." The Government always draws concluding charges or denials which, in many instances, are totally illogical, even against basic conscience or simple justice. Whereas, Appellant devotes itself to discovering evidence, even from concealment, and derive rigorous results and presents proofs, as desired. Judge Hodges' criticism, "Plaintiff's complaint, ..., contains serious charges against Judge Dicus -- fraud, deceit, ignorance, and caprice, ..."(MAP.7). The truth is these were not charges, but compelled evidence, derivations and proofs specifically required of Appellant. His statements also contain

serious implications.[5] During the proceedings, Petitioner had often presented evidence of "ignoring", but never "ignorance". Even in FOF.32, Judge Dicus' elementary arithmetic error, involving a three-fold compounded error (see TFOF.32 in BFA, p.32), was termed "an error under prejudicial sense of direction", without using the word "ignorance", as termed by Judge Hodges. Appellant had not claimed any compensation for the bad-faith conduct, only as corroborating evidence in support for Optimal's altruistic claim for reimbursement balance. Honorable Hodges should have righteously ordered

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[5]Judge's criticism of Appeal's evidence/proofs and his implication,"It is surprising that a member of the bar of any court would draft such pleadings as these", had, in effect, intimidated Mr. Gresko into declining further appealing. Also, Appellee Counsel Langer's verbal intimidation of sanction against Appellant, with liability to Appellant's Counsel Adams, caused Adams to decline further appealing.

Appellee to utilize GSFC's own experts, price analyst and small minority business specialist in order to enter truthful and fair negotiations for resolving this case, and to avoid further compounded errors and misinterpretations, etc., by honorable Judges. Consequently, the altruistic minority contractor may be saved from a total destruction by discriminatory abuse of discretion in a violation of Amendments V and XIV.

In conclusion, the Claims Court is the most responsible to resolve subject contract claim, so as to prevent further and over-exploring of the corroborating bad-faith conduct by government stemming from NASA-GSFC and BCA's consolidated mistreatment. As for the contract issues, expert examination of the derivations and analyses is a burden to the Court. In short, based on the informa-

tion quoted by Judge Hodges on Complaint 3 (MAP.7): "In the September funding meeting (1973), Dr. Teng emphatically gave notice to GSFC for a minimum monthly funding of $15,000 for a 3-year period while ODC was pledging for cost consciousness..."; thus, the total funding should be $540,000, as already preadjudicated, and as Optimal gave notice of. Therefore, there cannot be any Overrun nor LOC problem as illogically argued by BCA Judge Dicus and advocated by Judge Hodges. Under Optimal's truly altruistic management, the project was completed one-year ahead of schedule. The total cost, at great sacrifice to Optimal and its personnel, is approximately only $360,000, of which only two-thirds was paid. The balance of reimbursement, $137,000, is included in Claims I-V, plus allowable interest. No

other contractor, big or small, is able to support a 4-scientist project for over (2) years at an altruistic expenditure of $360,000 and succeed in the completion and delivery of a PLACE Real-time Software System (valued at $1.2 million in 1975). The project had been commended by GSFC T.O., Mr. Brandel as: "highly original and creative team, ... Dr. Teng and Optimal suffered a great deal (before appealing)...extracted a toll...!" (App.40-44). Although the cruel bad-faith conduct has been documented, under altruistic management, Optimal had not claimed compensation for this conduct. As delineated above, Judge Hodges' judgement in affirming BCA's decision is totally arbitrary, with obvious bias favoring Appellee and his colleague Judge Dicus, and with discrimination against Optimal and its principal, Dr. Teng, in

violation of Amendments V & XIV.

(c) Specific Evidence of Documentary Abuse of Discretion (DAD) by NASA-BCA, Especially Appeal Judge Dicus (No. 976-8) (See Appendix Papp.71-78):

(1) Judicial Defectiveness Due to BCA Judge Dicus' Conflict of Interest Violation:

Upon BCA's biased decision, the fact that Judge Dicus was formerly a legal counsel to Appellee, GSFC, was revealed as a violation in conflict of interest. Optimal appealed for reconsideration and for rectification, with request for recusal, all were denied with Chairman Lees' concurrence. Judge Dicus left NASA no sooner than finishing his decision of denial in December 1979. Judge Dicus returned to NASA replacing Chairman Lees in late 1985, when Optimal's Claims Court Appeal took effect. Appellee refused

Judge Gibson's court order for settlement. Four and a half years later, Judge Hodges took over the case, had a discussion with Judge Dicus re bias, which Dicus self-servingly denied, and both parties' attorneys were not present, as legally required. Judge Hodges rendered an arbitrary judgement, affirming BCA's decision. Then in June 1991, Appellant, as compelled, sought and found the Affidavit by Dr. Wolter, who participated in the GSFC meeting on Optimal's contract, and he testified that Dicus was present as GSFC's legal counsel. This Affidavit was submitted by Amicus Curiae to Appeals Court for Federal Circuit and prejudicially returned (Papp.5), so as to go forward on the Court's predetermined decision without an opinion. The sacrificial injustice and inequity have been mounting stemming from Judge Dicus' vio-

lation of the simple Judicial Code of Ethics, "...Appearance of impropriety must be avoided at all cost."

(2) Corroborating Evidence of BCA Judge's Bias in (DAD) Discriminatory Treatment of Petitioner, A Disadvantaged Minority Contractor under Altruistic Management:

Part A: Evidence of BCA Judge Dicus' Bias Related to Misconduct by the Government.

(i) Judge advocated T.O., Wishna's, playing C.O.'s role to control contractor with unreasonable constraints, and use curtailment scheme on pre-adjudicated and pre-requisite Task IA. However, Judge Dicus called it "reduction of scope", and "Overrun", to distort and deceive contract fundings, especially the fixed fees. (App.3,5,7,8)

(ii) Judge Dicus called "fixed-rate"

on-site contract a "fixed price" contract so as to help allege "mix-charging" from fixed price to CPFF contract, which was illogical due to WFC's contract deficit and impossible due to funding gaps in the GSFC project. (App.3,9,21 & 34)

(iii) Judge Dicus ignored evidence of funds pre-adjudicated by T.O. Brandel for Phase II tasks/subtasks (App.9-10). Task curtailment scheme was applied again, called "Overrun" and requiring LOCC, although the cost never exceeded pre-adjudicated funds, which were as much as $540,000. (TFOF.2-4, MAP.7)

(iv) Judge Dicus reworded the specification of "training" by changing "supporting personnel" to "respondent" to circumvent T.O., Brandel's misrepresentation in taking the training. (App.50; TFOF.21).

(v) BCA Judge purposely miscalled

CPA Thrailkill "Optimal's accountant" to hide the validity of a CPA's certified statement (TFOF.15; App.48,62). Also, Judge Dicus addressed Dr. Teng as "corporate president" of Optimal during the proceedings to deny Teng direct labor as project director, i.e. key personnel, charged at minimum wage ($2.25) in 1975 for (7) specified tasks, when previously he had always addressed Teng as director. (App.48 & 63, TFOF.15)

(vi) GSFC Keefe's unethical requests for redundant auditings on Voucher 33, and letter to SBA requesting decision in GSFC's favor, a pre-determination prejudice. (TFOF.19, App.23-24,27; AF.37-43).

(vii) BCA Judge fabricated a non-existing "Voucher 34" of $17,063, never identified in any file, to allege revising of it to the only genuine Voucher 34 of $55,141. (TFOF.40)

(viii) T.O. Brandel commended Optimal, "...a highly original and creative team," and praised key project personnel (App.40-44); whereas, Judge Dicus distorted this study contract as "services, repair, maintenance contract...". (BCA Decision Summary, para.4, Papp.19-21)

(ix) T.O.,Brandel admitted to his dialogue with Dr. Vande Linde re taking over the follow-on task to avoid funding problems with minority contractors on the study-type contract. He thought it was with good intention to avoid Optimal's suffering more funding gaps. (App.40-44)

(x) Dr. Vande Linde did not take over the follow-on effort; GSFC opened it for bid which violated SBA-SOP on 8(a) contracting. GSFC even rejected Optimal's proposal for the follow-on tasks for "cost", which violated NASA's Procurement rule: "no first rejection on cost," hence

illegal. (App.45) Furthermore, the follow-on contract was awarded to a big business, EG&G, T.O. Brandel's former employer, and at a price 2-1/2 times larger, i.e. over $500,000. That is a far more serious conflict of interest on the part of GSFC, as well as discriminatory treatment of Optimal.

Part B: BCA Judge Dicus' Bias Related to O/H Cost and DCAA's Misconduct:

(i) Judge Dicus advocated DCAA's concealment of its instruction for separate on-site/off-site O/H pools, uncovered in September 1977 (App.48).

(ii) DCAA instruction was for separate O/H of on-site contract, if awarded. BCA distorted that it be used before on-site contract award (when no on-site yet) for developing the on-site O/H rate which was already fixed in the fixed-rate contract. Then BCA posted the need of such

instruction for after the contract and also alleged of Optimal's misunderstanding of such instruction (FOF.11-14). (Equitability of O/H separation is a mandatory requirement and cannot possibly be misunderstood, as Judge Dicus implied.)

(iii) BCA used auditor Walker's Affidavit, "separate O/H not established at that time...", that was October 15, 1973, whereas the on-site contract started November 1973. Optimal was to establish separate O/H and its implementation by the start of on-site contract November 1973. In fact, Walker even inspected the implementation of such O/H separation with CPA in November 1973, as evidenced by DCAA's audit summary, "Summary Account of Cost by Project". (App.48, 58, 63)

(iv) DCAA Auditor never issued audit reports to Optimal, a discriminatory treatment, and the inequitable integrat-

ing of O/H computation, even after adjusting from 168% to the equitable O/H rate of 145.7% (App.19-20, 48,63) is a capricious act with gross errors.

(v) DCAA's recomputation of the integrated O/H was not done on Optimal's or Optimal CPA's facility, nor was cost data coordinated with Optimal's CPA. Such capricious conduct by DCAA was illegal in submitting its inequitable O/H rate on behalf of Optimal. Judge Dicus even adopted DCAA's inequitable and erroneous O/H rate, defying legal auditing procedure and its own instruction for O/H separation. (App.16-20, clause 153, Auditing for NASA.

(vi) Judge Dicus' Accusation of "Accounting System Change" and even "Retroactive Change": Judge Dicus must know that an accounting change is not feasible and a retroactive change is impossible

and illegal for a CPA to do. As for changing from 1-pool to 2-pool, it is not logical because O/H computation is not, as Judge misconstrued it, a part of cost accounting. O/H is computed only when called for and can be in both 1-pool and 2-pool, but only the equitable approach is to be used. Identification and segregation are the key to equitability. Such separation of the on-site from off-site operation is mandatory and even DCAA instructed.

(vii) Regarding DCAA's discreditability: As records from DCAA's file disclosed, DCAA had audited NAS8-26111 with a note, stating it is unallowable for Optimal to donate, while coercing Optimal to decline claiming the recovery of the deficit of $42,731. (App.54,55)

In summation, Judge Dicus fabricated new issues beyond facts, logic, and basic

conscience, cruelly denied Dr. Teng's minimum wage direct labor, and ignored Optimal's financial loss in NASA contracts, i.e., deficits of $42,731 (NAS8-26111); $66,735 (NAS6-2411); $137,000 (NAS5-21941), totalling $246,489 by 1975. Such cruel mistreatment of the minority contractor, under Dr. Teng's intrinsic practice of altruistic management, is historically unprecedented discrimination by Documentary Abuse of Discretion (DAD). The above mistreatment defies logic, simple justice, basic conscience, and are in violation of common law, Amendment VII.

(d) Specific Evidence of Documentary Abuse of Discretion (DAD) with Discriminatory Treatment of Petitioner by NASA-GSFC, Under a Minority Contract:

(1) Evidence of specific events of contractual mistreatment (Phase I) by GSFC T.O., Wishna's Misconduct, being

enumerated below:

Remark: The Optimal Solo Symposium (Papp.27, App.8) was never a stipulated task on the contract, nor had there been any cost estimate because of the disadvantage in lacking resources and legal assistance. Also, this symposium was to acquire funds from Maritime, FAA, Coast Guard, etc., and it succeeded. Optimal had been promised priority funding upon success of Optimal Solo Symposium; promise of priority not quite fulfilled.

(i) Wishna played C.O.'s role to control the project with unconscionable constraints, such as using GSFC facility (C.O. said this was not permissible for study contract); no per diem (Huntsville, AL to Greenbelt, MD); low labor rate and O/H rate, etc.

(ii) Wishna reneged the confirmed fundings for IA & IB (Papp.30) by cur-

tailing a pre-requisite task IA (which Optimal had to work during funding gaps).

(iii) Coerced Optimal to sign contract at reduced cost of Task IB at Wishna's ceiling, causing Optimal to suffer from funding gaps (later proven false by C.O., Wessel, who raised it by $800).

(iv) Wishna handwrote a cost estimate (Papp.31) on Form 533 to induce Optimal to work for "Optimal Solo Symposium", while already in the third month of funding-gap. The fund processing for Form 533 never came and he quit NASA, leaving the Task IA fund in Claim V.

(2) Specific evidence of contractual mistreatment (Phase II) by GSFC T.O., Brandel as enumerated below:

(i) T.O., Brandel cooperated with project personnel while still curtailing task-funds, although not curtailing any prerequisite tasks, precipitating future

funding gaps.

(ii) During critical funding gaps, Dr. Teng pledged to support project effort by O/H, while Brandel made personal loans to Project Manager, Dr. Samant, for certain emergency uses.

(iii) Brandel used his T.O. influence to get various project sub-subtasks done directly from project staff without using any official requests.

(iv) Brandel missed the last Rosman Tracking Station training session, as stipulated in the last modification and funds. He ordered a make-up session especially for him, but reimbursement for the added cost met with difficulty. In fact, Brandel misrepresented himself for the training (p.37, para. (iv)).

(v) Brandel coerced Optimal project personnel to relay to or teach him (government) Optimal's Real-time Software

System design, unethical in contracting and jeopardizing Optimal's proprietary information. However, the conduct in two events mentioned above were not known to be illegal until in the Appeal proceedings.

(vi) Mr. Brandel, as we knew from the beginning, is basically an honorable and capable scientist and indicated his concern with minority contractors. Optimal is grateful for his integrity in commending Optimal's project success and his special praise of each key person, yet no award was granted, not even a rewarding of "highly original and creative, ..., extraordinary effort, ..., Optimal and Dr. Teng suffered a great deal, and an extra toll,...". No assistance was given in fighting the opposition's discriminatory funding of minority contracts on such a study-type contract (App.40-44).

(vii) Mr. Brandel did talk with Dr. Vande Linde re taking over the follow-on tasks without using minority contractors, so as to avoid Optimal's suffering further funding gaps. This is indicative proof that GSFC had been prevailing in discrimination against minority businesses, such as Optimal's project.

(viii) T.O. Brandel had not been righteously strong enough to fight for reimbursement of Optimal's altruistically managed contract cost.

(ix) T.O. Brandel failed to follow NASA's Procurement Rule to prevent the irregular/illegal rejection of Optimal's follow-on tasks proposal. In fact, the opening of the bid for 8(a) contract follow-on tasks was already illegal, violating SB Act 8(a) SOP regulations.

(x) T.O. Brandel had even manipulated that the open bid went to EG&G, his

own former employer, an obvious conflict of interest.

(3) Evidence in Specific Events of Contractual Mistreatment by Certain GSFC Officials' Conduct as enumerated below:

(i) The GSFC Industrial Assistance Office and Small Minority Specialist are always cordial and entertain minority businessmen, but never have the authority to act on some useful decisions. The root of the problem is that GSFC does not want to use their functions to help resolve certain minority contractors' problems. But, GSFC prefers to use the powerful legal counsel's office to end the problems by discouraging the contractors or defeating them with Documentary Abuse of Discretion in or out of court, disregarding simple justice and equitability.

(ii) Optimal had always struggled to solve complicated technical problems in

the midst of funding gaps. There was never money nor time for expensive legal counselling, only "goodwill" counselling, when available -- the more counselling, the more discoveries. Dr. Veccaro, the highest authority official ever encountered by Optimal regarding this contract, waived LOC. The off-balanced negotiations between disadvantaged minorities and the government's GSFC officials, Mr. Keefe, Mr. Higgins, Ms. Kelley, etc., involved the following events:

1/. It was about June 1975, Dr. Teng visited Mr. Higgins' office regarding Voucher 33B. Higgins had received a copy of DCAA's Note 1 and read it to Teng, saying it was "DCAA's determination, not ACO's determination". Teng asked to see it for himself and was refused, raising his suspicion. Then, via Col. Lieblich, Teng requested a copy of the note, which

showed "determination by ACO", proving Teng's suspicion correct -- an act of deceit by GSFC's C.O., Higgins.

2/. Higgins wrote SBA for help in sharing the cost, to no avail. Higgins commended Optimal's competence, yet criticized Optimal's inability to project cost. (First notice of $540,000 fund for 3-years, then adjudicated at $364,000, actual cost about $360,000, still leaving one-third, $137,000, not yet reimbursed.)

3/. Teng and Lieblich visited director Keefe, who reacted to SET's debunking DCAA's report, and suggested Optimal recover O/H hours to the original direct labor hours for reimbursement consideration. Such a change is impermissible by CPA because the O/H payment he denied is far less than the direct cost plus O/H payment he suggested -- a deliberate attempt to misguide Optimal.

4/. Ms. Kelley presented Dr. Teng a "handwritten table of manhours", a singular treatment to Optimal only, i.e. a discriminatory act.

5/. In those meetings, GSFC's Minority Specialist nor Price Analyst ever participated. The government only wanted to intensify documentary abuse of discretion to dissuade minority, never resolving a minority problem via its Small Minority Specialist, nor resolving a contract cost problem via its Price Analysts. If such an approach had been used, legal counsels, hearing officers and even judges could have avoided such compounded errors and misinterpretations.

6/. Regarding collusion with DCAA and SBA: DCAA's discredibility has been proven by App.54-56. SBA denied sharing of cost, then influenced DCAA to recompute the inequitable O/H and illegally

submitted in Optimal's behalf. GSFC Keefe asked SBA for a predetermination in GSFC's favor, a prejudicial act.

7/. C.O. Chief, Mr. Shorter, in preparing Appeal File under Counsel Callan's direction concealed the minutes of 1975 meetings on Optimal's contract, and also the CCD (submitted along with each voucher). Such concealment is a violation.

8/. GSFC legal counsel, Callan, displayed prejudicial Documentary Abuse of Discretion (DAD) in the prehearing conference. He extended his prejudice by issuing 12-issues of fact and 8-issues of law for Optimal to respond. Whereas, from voluminous documents, Appellant summarized a tabulation with derivations, and all elements are substantiated by references cited therein. Yet, Appellee-BCA has never raised a responding question to any element of such a tabulation.

The case was then pre-fixed by BCA Judge as 20 issues versus none, thus precipitating a biased decision. (Papp.28,29)

9/. Mr. Callan even played the role of T.O. to insultingly question, "what Teng can do on the project?" He also played the role of price analyst in alleging Optimal's Accounting System changes. This is illogical under accounting standards and impermissible by CPA.

10/. Mr. Callan misconstrued O/H computation as an inner part of the accounting system, defying common sense. To separate the on-site low O/H from off-site high O/H is equitable, whereas to integrate is inequitable. O/H can be computed in 1-pool or 2-pool, whichever is equitable to use. Despite Optimal's Prologue III-A "Definitions and Basic Formulae for O/H and G&A" and III-B "Basic Truth Concerning Indirect Cost" Seg-

regation, Mr. Callan illogically alleged Optimal's separate O/H was advised by O'Donnel, SBA auditor.

In summation of Section III, as the special evidence depicted in (a)-(d), NASA-GSFC and BCA consolidated in DAD mistreatment of Optimal with DCAA's fraudulent report and SBA's pre-determined decision, defying its own auditor's report. The specific DAD actions/inactions are GSFC's (12) issues of fact and (8) issues of law (App.66-101) plus Judge Dicus' newly created issues, while Optimal's summarized derivations/proofs for reimbursement claim, as exhibited in Appendix, Papp.27-35, et al, were persistently ignored. Moreover, under NASPR's Reasonableness and NASA's Cost Reduction Program (1969), Optimal's proclaimed altruistic management, as shown in Prologue I-C, App.106-111; App.55-56, et al, was

never questioned by GSFC and BCA, yet they persistently impeded this minority contractor. The discriminatory DAD has been aggravated by the courts below, all in violation of Amendments V and XIV. In addition, certain GSFC and BCA misconduct is illogical, unconscionable, unjust and inequitable, and therefore an infraction of common law in violation of Amendment VII, thus, all the more deserving of honorable Court to grant Writ of Certiorari for a great relief to a major class of minority victims.

SECTION IV. SUMMARIZATION AND CONCLUSION

(a) Summarization of Instant Petition:

(1) Summary of Resolution to Questions Presented: The question in 1.0, has been presented with extraordinary effort in studying and analyzing all events relevant to Documentary Abuse of

Discretion (DAD) involving discrimination, with evidence and proofs to substantiate positive resolutions to the Questions 1.1, 1.2, 1.3, and 1.4. The positive resolution to Question 1.1 has been substantiated by the presentation of Section III (a) Specific Evidence of Documentary Abuse of Discretion by U.S. Court of Appeals for Federal Circuit, containing subsections (1)-(4) detailing these events that depict the detriment of Petitioner by evidential discrimination. It concluded with Optimal's Foreword Pleading for dismissing contentions of the party(s) for fraud committed while willingly accepting punishment as for fraud, if its altruistic management was found untrue.

As for Question 1.2, specific events are presented in Section III (b), Specific Evidence of Documentary Abuse of Dis-

cretion by U.S. Claims Court, subsections (i)-(vii). For clarity, the events are categorized in three sections: 1/. Court Order for Settlement and Government's Refusal; 2/. Court's Granting Appellee's Motion to Suspend Pre-trial Proceedings with (7) Itemized Requests; and 3/. Court Decision by Judge Hodges. Thus, Judge Hodges' decision is proven arbitrary with DAD and discriminatory bias favoring government, particularly BCA Judge Dicus, against Optimal, the disadvantaged minority contractor practicing altruistic management.

Section III (b) concluded with court's prejudice, caprice, misinterpretation and errors, whereas Petitioner had hoped the case would be resolved since Optimal's notice for $540,000 funding (p.32) had been quoted by Judge Hodges. Of the $540,000 funding, Optimal expended

only $360,000, and, as in the claim, 1/3 of this low cost, $137,000, has yet to be paid. Whereas, Optimal had not claimed any compensation for the harm/detriment from the government's misconduct.

As for Questions 1.3 and 1.4, the substantiated resolutions are presented in Section III (c) and (d), with further clarification in the subsections re various government mistreatment (NASA-BCA and GSFC) involving documentary abuse of discretion (DAD) and discrimination against Optimal. Plaintiff's documents containing summarized derivations and proofs of subject claim (Category II-A of the Appendix, Information for Special Attention, Papp.27-35) were totally ignored nor ever questioned. The government's discriminatory misconduct even includes proven illegal actions culminating to a circumstantial conspiracy in pre-deter-

mining Dicus as the Appeal Judge for the case, just to impede Optimal's claim.

(2) Requirement of Special and Important Reasons for the Petition: In Section II, a 4-stage issue on documentary abuse of discretion (DAD) is presented: In Section II(a): DAD against disadvantaged minority contractors in defying Equal Access to Justice Act to its obsolescence--a violation of Amendment XIV; in II(b): DAD in denying altruistically managed cost in minority contracts causing injustice and inequity in violation of Amendments V and XIV; in II(c): Practice of altruistic management by minorities being intrinsically under the Aspiration of True Americanism, as preached by late President Kennedy to all Americans, and by Justice Thomas to minority Americans, deserving protection and promotion by Honorable Court by granting a

writ; and in II (d): The unique contract cost reporting instrument, Optimal's "Contract Cost Data (CCD) sheet" as key device to demonstrate its altruistic management system under Optimal's Doctrine of Small Business Operations - deserving Honorable Court's notice and evaluation for its application to all contracts.

It concluded with an effective resolution to the DAD discriminatory treatment of minorities relying on the honorable Court to grant a landmark decision for Writ which will further inspire a DAD Amendment to the Equal Access to Justice Act that shall assure justice and equitable relief to a major class of victims.

(3) Summarization of Subject Petition Regarding Stipulation of Claims: As consistently presented in early pleadings, the Summarized Stipulation of Reimbursement Claims is reiterated below:

CLAIM I: $ 467
Balance Voucher 33B (Due to GSFC's misuse non-provisional O/H rate)

CLAIM II: $55,141
Voucher 34 for 1973-74 O/H due ODC (G&A due Government)

CLAIM III: $32,489
Voucher 35&37, 1975 and after, direct labor/other direct cost

CLAIM IV: $30,892
Voucher 36 for 1975 O/H & G&A

CLAIM V: $18,029
Reimbursement for ODC's Effort Sep.22-Nov.9, '73 (T.O. Reduced adjud. amt to $24,600 for Task IA)

TOTAL REIMBURSEMENT CLAIM: $137,000 + interest[6]

Amount Reimbursed	$224,889	
Total Cost (Fee?)	$361,889	
Recapitulation Funds Derivation	$361,750	(App.64)
Total Adj. Funds (App.3,5,7)	$358,537	(+fee?)
LOC noticed fund (Sep.'73 funding meeting,MAP.9,Papp.15)	$540,000	

[6] Clause 217 (Interest Payment, Aug. 1972), cases: N.Y. Shipping Co v U.S. ASBCA 16164 July 1978, Ramsey, et. al, vs. U.S. No.50010 U.S.Cl.Ct. December 1981, Appellant earnestly prays for relief of allowable interest.

In summation, the above derivations totalling $361,889 (+ fees?), and the recapitulation of fund status yielding $361,750 (Papp.28,29 & App.64), also total the adjudicated fund $358,537 (App.3, 5, 7, 9) and well support the above stipulated claims. Note, these figures are far below the $540,000, as quoted by the Judge (MAP.9). This is an indisputable achievement by the exemplified altruistic minority contractor, who deserves relief of this reimbursement claim and Honorable Court's granting of the Writ for protection of the minority's constitutional rights, viz. Amendments V, XIV, and VII.

A note about use of the appendices to the Petition: All key-indexed pages are designated as Papp.# (Petition Appendix page number) and are categorized for clarity and ease in referencing. Special notes are given on certain documents as needed or desired. All submissions to Appeals Court are stored in its clerk's office; all earlier submissions were filed in U.S. Claims Court Clerk's Office.

SECTION IV. (b) Conclusion

WHEREFORE, Petitioner, based on the foregoing Special and Important Reasons, as evidenced by documentary abuse of discretion with discrimination against minority contractor, violating Constitutional Rights, Amendments V and XIV, via the Reconstructed Constitution of Minnesota Art.2 Rights and Privileges, do petition for Writ of Certiorari. As an exemplified minority practicing altruistic management on contracts under aspiration of self-reliance for true Americanism, Petitioner prays for the Writ with direct orders for relief of its claim and such further compensation for bad-faith conduct causing detriment and suffering, as honorable Court deems fair and proper.

Respectfully submitted, Chris J. Christie

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APPENDIX TO OPTIMAL DATA CORPORATION'S
PETITION TABLE OF CATEGORIZED CONTENTS
(KEY TO PAPP.# REFERENCES)

CATEGORY/TITLE	DATE	PAPP#
CATEGORY I - MANDATORY DOCUMENTS		
Appls Ct Judgement Order	11/12/91	1
Appls Ct Notice for Oral Argument Schedule	9/30/91	2
Appls Ct Notice re Removal From Oral Argument Calendar and Decision be made on Briefs	10/31/91	3
Appls Ct Notice of Entry of Judgment without Opinion	11/12/91	4
Appls Ct returning Amicus Curiae's Submission	10/28/91	5
Claims Ct Order for Settlement by Judge Gibson	11/20/87	6
Appellee's Refusal of Settlement	2/01/88	7
Claims Ct Order Granting Motion to Suspend Pre-Trial Proceedings (Judge Gibson)	9/16/86	8-9
Appellee Motion to Suspend Pre-trail	8/25/86	10-13

Proceedings

Claims Ct Order for Final Submission (Judge Gibson)	10/31/88	14
Claims Ct Decision with Opinion by Judge Hodges (See note for references; complete copy in Attachment to Brief for Appellant (MAP.3-14).	1/30/91	15
Claims Ct Order re Counter Claim	2/05/91	16
Claims Ct Order for Teleconference	6/26/89	17
NASA/BCA Decision on Reconsideration & Rectification Appeal	12/28/79	18
Summary of NASA/BCA Decision by Judge Dicus (Note: Final Decision for Reconsideration dated 12/28/79) (Decision published [113,624] Commerce Clearing House, Inc., 1979. Also filed in Appellee's Brief & Appendix to Appls. Ct. Typewritten copy filed in Claims Ct. folder #4 of 16, by BCA recorder.)	12/13/78	19-21

CATEGORY II - EXTRACTS FROM PREVIOUS SUBMISSIONS IN APPEAL PROCEEDINGS

(A) Information for Special Attention:

Amicus Curiae Submissions Returned by Appls Ct (PAPP.5):		
Dr. Wolter's Affidavit	6/14/91	22
CPA Thrailkill's Memo	8/22/91	23-26
Agenda of Solo Symposium	11/07/73	27
Recapitulation Funded/ Not-Yet Funded Costs Phase I & II (App.64)		28
Listing of Major Tasks Not-Yet Funded (App.64)		29
Confirmation of Funding for Tasks IA& IB (Wishna/Teng) (App.3)	5/16/73	30
Wishna's Handwritten Reduced Cost Estimate for Task IA (App.7)		31
Schedule of Phase II Tasks/ Subtasks/Fundings (App.9)		32-33
Optimal's Contract Cost Data (CCD) (App.24,27)		34
Extract of T.O. Brandel's Commending Optimal's Performance (App.40-44)		35

(B) Exhibits of Tables/Listings Submitted in Appeal Proceedings:

Extract of ODC SAF (Supplementary Appeal File) Listing	36-39

(App.1-65), Dr. Teng's Affidavit, mainly in answering (12) Issues of Fact and (8) Issues of Law (App.65A-101), A Compendium of Prologues, I-A, B,C, II-A,B,C, III-A,B,C, (App. 102-119) from Appellant Appendix (Last filed in Appls. Ct-Fed)

GSFC Appeal File (AF) Listing (Tab.1-55) (Government Appeals File could not be found in U.S. Cl. Ct. Clerk's Office in a complete, consecutive and indexed manner, Folders 1-16) 40-43

Index of Prehearing Conference File (PHCF) (Submitted by BCA to CL. Ct.) 44

Index of Record (CL. Ct. Clerk) 45-46

(C) Tables of Contents (T.O.C.) of Earlier Submissions Prior to Petition:

(1) Re: BCA
Complaint T.O.C. 47
Appellant's Reply T.O.C. 48

Detailed Information in Support of Subject Appeal 49-50

Prologues I-A,B,C;II-A,B,C; III-A,B,C 51-53

Prologue II-C - Categorized Listing of Not-Yet Funded Tasks performed by ODC Under Subject Contract 54-55

Appeal for Reconsideration,T.O.C. 56

Appeal for Rectification of BCA's Denial, T.O.C. 57

(2) Re: Claims Court
Appellant Brief,T.O.C. 58-59
Plaintiff Reply Brief, T.O.C. 60

Plaintiff's Memo of Genuine and Material Facts, T.O.C. 61

Plaintiff Motion, T.O.C. 62-63

Plaintiff Response on FOF with Compendium of Prologues, T.O.C. 64-66

(3) Re: Appeals Court
Brief for Appellant (BFA),T.O.C. 67-68
Appellant Reply Brief (RBFA), T.O.C. 69-70

Special Appendix 71-79
Recapitulation of Plaintiff's Truthful Findings of Fact (TFOF)

NOTE: All documents shown in (B) and (C) above can be found with complete contents in the U.S. CL. Ct. Clerk's Office, except GSFC A.F. & BCA PHCF which were without ordered indexes; the BFA and RBFA (Brief, Reply Brief for Appellant), and Appendix are stored in the Appls. Ct. Clerk's Office.

U.S. COURT OF APPEALS FOR FEDERAL CIRCUIT

91-5070

OPTIMAL DATA CORPORATION,
Plaintiff-Appellant,
v.
THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
NOV 12, 1991
FRANCIS X. GINDART
CLERK

ON APPEAL FROM: United States Claims Court

in CASE NO(S). 760-85 C

this CAUSE having been considered, it is

ORDERED and ADJUDGED:

Per Curiam: (CLEVENGER, Circuit Judge, SMITH, Senior Circuit Judge, RADER, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED NOV 12, 1991 FRANCIS X. GINDHART, CLERK

COURT OF APPEALS FOR U.S. FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

September 30, 1991

Dear Counsel:

The attached calendar includes the date, courtroom and time allotted for oral argument in your appeal. The order of argument is subject to change. If the court elects to revise this time allotment you will be notified in approximately ten days.

.....
.....
.....

If there are any questions, please contact Diane Frye, 202/786-6203.

Very truly yours,

Francis X. Gindhart
Clerk

Attachment:

U.S. Court of Appeals Federal Circuit
November 1991 Calendar

**DATE: Wednesday 11/06/91
* TIME: 10:00 A.M. COURTROOM: 1

DOCKET	CAPTION	FOR APPL'NT	TIME	FOR APPL'EE	TIME
91-1205	GROVES V ARMY	CHRISTENSEN	15 MN	BERNOTT	15 MN
91-5070	OPTIMAL V US	ADAMS	15 MN	LANGER	15 MN

etc.
NOTE: Receipt of 9-30-91 letter was acknowledged on Court provided form by Attorney Adams on 10-17-91; final due date was 10-18-912.

U.S. COURT OF APPEALS FOR FEDERAL CIRCUIT

October 31, 1991

Mr. Eric F. Adams
Grisham & Adams
P.O. Box 5961
Huntsville, AL 35814

Mr. Paul D. Langer
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: 91-5070, OPTIMAL DATA V US

Dear Sirs:

After reviewing this case, the panel has determined unanimously that it does not deserve oral argument.

Accordingly, the case has been removed from the argument calendar and will be decided on the brief.

Very truly yours,

Francis X. Gindhart
Clerk

df

U.S. COURT OF APPEALS FOR FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: NOV 12, 1991

The judgment of the court in your case was entered today pursuant to Rule 36. No opinion accompanied the judgment. The mandate will be issued in due course.

Costs may be recoverable under Rule 39. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the Party awarded its costs. If costs are awarded to the government, the should be Paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be Paid promptly.

Exhibits and visual aids shall be Promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

OPTIMAL DATA V US, 91-5070
(CLM - 760-85 C)

U.S. COURT OF APPEALS FOR FEDERAL COURT

OPTIMAL DATA CORPORATION Appellant,	*	
VS	*	No. 91-5070
THE UNITED STATES, Respondent.	*	

Applicant's Request for Honorable Court's Permission to Act In Amicus Curiae's Function

Since Appellee's attorney of this case, Paul Langer, has never responded to Applicant's letter of September 27, 1991, with suggestions for Amicus Curiae's submissions, Applicant hereby respectfully moves the honorable Court for permission to act as an Amicus Curiae. The main function for Amicus Curiae is to submit the key documentary evidence in the form of an Affidavit, which Applicant believes will be of common benefit to all parties. Applicant earnestly prays for a prompt granting of this request.

Eric F. Adams, Esq.
GRISHAM & ADAMS ATTORNEYS
4011 Marie Avenue, N.W.
Huntsville, AL 35816
(205) 837-5100

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
OCT 28, 1991
FRANCIS X. GINDHART
CLERK

This motion is DENIED.
FOR THE COURT,
FRANCIS X. GINDHART, Clerk
Diane Frye, Chief Deputy Clerk 10-31-91

IN THE UNITED STATES CLAIMS COURT
No. 760-85C

(Filed: November 20, 1987)

OPTIMAL DATA CORPORATION
V.
THE UNITED STATES

ORDER

The court held a telephonic status conference on November 19, 1987, in the above-captioned matter to ascertain whether the parties had exhausted all means of settlement. To date, the parties reported that they have had no settlement discussions. Nevertheless, both parties are willing to engage in settlement discussions with a view towards amicably resolving the issues.

THEREFORE, IT IS HEREBY ORDERED that all proceedings shall be stayed for 30 days from the due date of defendant's reply brief (December 31, 1987), i.e., to and including February 1, 1988, to provide the parties with an opportunity to reach settlement. If disposition has not been accomplished by February 1, 1988, the parties shall file with the court at that time a status report as to settlement progress. Defendant must timely file its reply brief notwithstanding the stay.

IT IS SO ORDERED.

Reginald W. Gibson, Judge

IN THE UNITED STATES CLAIMS COURT

OPTIMAL DATA CORPORATION,)
Plaintiff,)
V.) No.760-85C
THE UNITED STATES,)
Defendant.)

DEFENDANT'S STATUS REPORT

Pursuant to the Court's November 20, 1987 order, defendant files its status report.

Defendant's counsel has conferred with counsel from the National Aeronautics and Space Administration concerning the possibility of settling this action. Upon careful consideration of plaintiff's claims and the facts surrounding them, defendant is of the opinion that grounds do not exist upon which this case can be settled.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

DAVID M. COHEN,
Director

M. SUSAN BURNET
Assistant Director

JOSEPH A. KIJEWSKI
Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
2nd Floor, Todd Bldg.
Washington, D.C. 20530
Tele: (202) 724-6289
Attorneys for Defendant

February 1, 1988

IN THE UNITED STATES CLAIMS COURT
No. 760-85C

(Filed: September 16, 1986)

OPTIMAL DATA CORPORATION

V.

THE UNITED STATES

ORDER SUSPENDING PRETRIAL PROCEEDINGS

Whereas this action seeks review of the decision of the National Aeronautics and Space Administration Board of Contract Appeals (NASA-BCA) denying plaintiff's claims. Additionally, the captioned action is premised on a contract subject to the Wunderlich Act Review Standards and therefore a trial de novo is inappropriate. Accordingly, under the foregoing circumstances, the court is limited to a review of the formal administrative record developed before the NASA-BCA. Consequently, pursuant to paragraph I of Appendix G, Procedures Before Trial, the procedures delineated in Appendices G and H of the Rules of the U.S. Claims Court (RUSCC) are contra indicated. 1/

1/ "I. General 1. The judge may modify these procedures, in whole or in part, as appropriate in the circumstances of the case, or the parties may suggest by motion such modification of these procedures."

IT IS THEREFORE ORDERED THAT:

1. Within 60 days (i.e., on or before Nov. 17, 1986), defendant shall obtain and file with the court the entire original administrative record, appropriately certified, in NASABCA No. NAS5-219-41, upon which the administrative decision was based;

2. The application of Appendices G&H of the RUSCC are vacated for the purposes of this proceeding;

3. The procedures set out in Rules 161-168 of Rules of the predecessor U.S. Court of Claims, found at 189 Ct. Cl. Appendix (1969), are adopted for this action;

4. Plaintiff shall file, pursuant to Rules 161-168 of the Rules of the predecessor U.S. Court of Claims, a motion for summary judgment within 90 days (i.e., on or before Dec. 17, 1986);

5. Defendant shall file, pursuant to Rules 161-168 of the Rules of the predecessor U.S. Court of Claims, a cross-motion from summary judgment within 90 days of service of plaintiff's motion for summary judgment;

6. Plaintiff shall file its response and reply within 60 days of service of defendant's cross-motion for summary judgment; and

7. Defendant shall file its reply within 60 days of service of plaintiff's response and reply.

_____

Reginald W. Gibson, Judge

IN THE UNITED STATES CLAIMS COURT

OPTIMAL DATA CORPORATION,)
Plaintiff,)
V.) No. 760-85C
THE UNITED STATES)
Defendant.)

DEFENDANT'S MOTION TO SUSPEND PRE-TRIAL PROCEEDINGS

Defendant respectfully moves the Court to suspend pre-trial proceedings and to enter an order controlling further proceedings. In support of this motion we rely upon the pleadings and the following memorandum.

On June 22, 1973, plaintiff was awarded a subcontract by the Small Business administration (SBA) under prime NAS5-21941 between the National Aeronautics and Space Administration and SBA. The disputes arising out of the performance of this contract were submitted to the National Aeronautics and Space Administration Board of Contract Appeals (NASA-BCA) for resolution pursuant to the Disputes clause of the contract. The

NASA-BCA issued its decision denying the claim on December 13, 1978, and denied plaintiff's motion for reconsideration on December 28, 1979. This action seeks review of the decision of the NASABCA denying plaintiff's claims.

This action is founded on a contract subject to Wunderlich Act Review standards. See Former Court of Claims Rules 161-168, 189 Ct. Cl. Appendix (1969). Accordingly, a trial de novo is not appropriate; the Court is limited to a review of the record before the NASA-BCA. United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963). Following the procedures outlined in Appendix G and H of the Rules of the United States Claims Court would therefore result in gross inefficiency and delay.

Accordingly, defendant requests the Court enter an order:

1. That within 60 days of the date of the order, the defendant shall obtain and file with the Court the entire original administrative record, appropriately certified, in NASABCA No. NAS5-21941, upon which the administrative decision was based.

2. That Appendixes G and H of the Rules of the United States Claims Court are vacated for the purpose of this proceeding.

3. That the procedures set out in Rules 161-168 of the Rules of the Court of Claims, found at 189 Ct. Cl. Appendix (1969), are adopted for this action.

4. That the plaintiff file, pursuant to Rules 161-168 of the Rules of the Court of Claims, a motion for summary judgment within 90 days of entry of the Court's order.

5. That the defendant file, pursuant

to Rules 161-168 of the Rules of the Court of Claims, a cross-motion for summary judgment within 90 days of service of plaintiff's motion for summary judgment.

6. That plaintiff serve its response and reply within 60 days of the service of defendant's motion for summary judgment.

7. That defendant serve its reply within 60 days of the service of plaintiff's response and reply.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

DAVID M. COHEN, Director

THOMAS W. PETERSEN
Assistant Director

VAN TEASLEY, Attorney
Comm. Lit. Br., Civil Div.
Dept. of Justice, Class. Unit
2nd Fl., Todd Bldg.
Washington, D.C. 20530
Tele: (202) 724-7248
Attorneys for Defendant

August 25, 1986

IN THE UNITED STATES CLAIMS COURT

No. 760-85C

(Filed: October 31, 1988)

OPTIMAL DATA CORPORATION
V.
THE UNITED STATES

ORDER

As the parties are proceeding in this case on cross-motions for summary judgment, counsel shall file with this court, on or before December 16, 1988, a joint stipulation of all of the operative undisputed and material facts bearing on said motions. If, at the time of said filing, there are some facts which one party deems to be genuine and material, and a stipulation cannot be reached relative thereto, a memorandum delineating those facts, serially numbered, shall also be filed simultaneously.

IT IS SO ORDERED.

Reginald W. Gibson, Judge

FILED
OCT 31, 1988
U.S. CLAIMS COURT

IN THE UNITED STATES CLAIMS COURT
No. 760-85C
(Filed: January 30, 1991)

* * * * * * * *
OPTIMAL DATA CORPORATION, *
Plaintiff, *
v. *
THE UNITED STATES OF AMERICA, *
Defendant. *
* * * * * * * *

Donald S. Gresko, Endwell, New York for plaintiff.

Paul Langer, Washington, D.C., with whom was Assistant Attorney General Stuart M. Gerson, for defendant.

OPINION

HODGES, Judge.

This case is before the court on cross motions for summary judgment. Plaintiff Optimal Data Corporation (Optimal), seeks review of a decision by the National Aeronautics and Space Administration Board of Contract Appeals (Board) pursuant to the Wunderlich Act, 41 U.S.C. S 321-322 (1988). For the reasons discussed below, plaintiff's motion for summary judgment is denied.

NOTE: Reference Appendix to Appellant's Brief submitted to Apls.Ct.#91-5070 Facts, MAP4-6, Discussion, MAP6-10, Conclusion, MAP11, Concurrence by BCA Chrmn. Lees, MAP12-14.

IN THE UNITED STATES CLAIMS COURT

No. 760-85 C

OPTIMAL DATA CORPORATION

v.

THE UNITED STATES

JUDGMENT
FILED
FEB 5, 1991

Pursuant to the opinion of January 30, 1991, and the order of February 4, 1991,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed and that defendant recover on its counter-claim, of and from the plaintiff, the sum of $19, 063.00. Each party will bear its own costs.

Frank T. Peartree

Clerk of Court

February 5, 1991

By:

Deputy Clerk

Note: As to appeal, 60 days from this date, see RUSCC 72. Filing fee is $105.00.

IN THE UNITED STATES CLAIMS COURT

No. 760-85C

(Filed: June 26, 1989)

OPTIMAL DATA CORPORATION
V.
THE UNITED STATES

ORDER

The telephonic status conference in this case originally scheduled for Monday, June 26, 1989, is hereby rescheduled for Monday, July 10, 1989, at 2:30 p.m.

IT IS SO ORDERED.

Reginald W. Gibson, Judge

FILED
June 26, 1989
U.S. CLAIMS COURT

NASA BOARD OF CONTRACT APPEALS

In the Appeal of	)	NASA BCA NO.976-8
	)	
OPTIMAL DATA CORP.	)	DATE: Dec. 28, 1979
	)	
Contract NAS5-21941	)	

APPEARANCE FOR APPELLANT:
Dr. Lincoln Teng
Director
Optimal Data Corp.
P.O. Box 4467
Huntsville AL 35802

APPEARANCE FOR GOV'T:
Pierre M. Hartman, Esq.
Office of General Counsel
NASA Headquarters
Washington, DC 20546

John P. Callan, Esq.
Office of General Counsel
GSFC/NASA
Greenbelt, MD 20771

DECISION ON APPELLANT'S MOTION FOR RECTIFICATION

Appellant has filed a Motion for Rectification of Appeal Judge's Denial of Appellant's Motion for Summary Judgment The said Motion was received on December 11, 1979. The decision on Appellant's summary judgment motion was dated August 28, 1979. It is untimely, coming as it does more than 100 days after the date of the decision on the prior motion and at a point when the decision on the Motion for Reconsideration of the Board's decision on the merits of the appeal, for which summary judgment was moved, is substantially complete. It is denied for that reason.

SUMMARY OF BCA DECISION BY JUDGE DICUS

Optimal's Appeal Apls Ct-Fed 91-5070
Re:NAS5-21941 US CL.CT.#760-85C
NASA-BCA NO 976-8

(113,624) OPTIMAL DATA CORPORATION
NASA BCA No. 976-8. December 13, 1978.
Contract No. NAS5-21941.

Cost Principles--Allocation of Indirect Costs--Accounting Method Changed--Change from One to Two Overhead Pools

"A contractor who was performing two contracts for the government, one at a fixed-price and one on a cost-reimbursement basis, was not allowed to change his accounting method of allocating overhead costs from a one pool system to a two pool system because the change would unfairly transfer indirect costs from the fixed-price contract to the cost-reimbursable one. The contractor already was performing the cost-reimbursable contract when he entered into the fixed-price one. The second contract was awarded under the Small Business Administration's 8(a) program for minorities, price of which was negotiated based upon a single overhead rate for all his contracts. It was also an "on-site" contract employing government facilities and so had a lower overhead than the cost-reimbursable one. After the fixed-price contract was performed, the contractor retroactively divided his overhead into two pools, one for on-site and one off-site. This resulted in raising the overhead costs on the cost-reimbursable contract without

affecting the price of the fixed-price contract. No advance approval was given for this change in accounting methods. Costs that exceeded the overhead allowance in the original contract were not allowed."

Cost Principles--Limitation of Cost

Clause--cost Overrun--Timely Notice

"A contractor was not entitled to reimbursement for the salary of his president or for transportation costs that exceeded the amounts provided in his cost-reimbursement type contract because he did not give notice of the overruns before he filed his claim. The Limitation of Cost clause included in his contract required him to notify the government if he was going to exceed the cost limitations contained in his contract. He failed to do so, and the first notice that the government had of the overruns was when he filed a voucher for their payment."

Cost Principles--Limitation of Costs

Clause--Provisional Overhead Rate

Exceeded--Determination of Final Rate

"The NASA board of contract appeals remanded a contractor's claim for overhead costs that exceeded the provisional rates set for his contract because the contractor was entitled to a determination by the contracting officer as to the final overhead rates to be applied to the contract. The contracting officer had refused to allow costs in excess of those

provided. This was erroneous since the rates were provisional."

Changes--compensability--Services, Repairs, Maintenance Contracts--Contract Modification

"A contractor was not entitled to additional compensation for developing software, allegedly a new task not covered by the original contract requirements, because there were several contract modifications made during performance and it was impossible to tell whether the costs incurred were merged into any of the modifications. The contractor had poor proof of his alleged costs and very little evidence that there was any additional work. No separate proposal for performing the extra work was ever submitted by the contractor during the contract modification negotiations. His poor records made it impossible to tell if the alleged work was covered by any of the modifications."

Dr. Lincoln Teng, director, for the Appellant. Pierre M. Hartman and John P. Callan for the government."

Published in its entirety, Commerce Clearing House, Inc., 1979

Note: This BCA decision has been included in the Defendant Reply Brief in Appendix and also in BCA administrative records submitted earlier to the Claims Court, Folder #4 of 16.

AFFIDAVIT OF ARTHUR WOLTER

My name is Arthur Wolter and I live at 700 SW 17th Street, Boca Raton, FL 33486. My telephone number is (407) 394-8414.

I was an employee of the Goddard Space Flight Center (GSFC), NASA, located in Greenbelt, MD. During the period involving the Optimal Data Corporation (ODC) contract with GSFC, my position was that of Head of the Small Minority Business 8(a) program for the Center by appointment from Dr. James Clark, Center Director.

By law, and in accordance with duties assigned, I intervened on behalf of Dr. Lincoln Teng, Director of ODC, in receipt of his letter of complaint dated March 19, 1975, with the Chief of Procurement, Mr. Clifford Shorter, to call a meeting of Technical and Procurement personnel involved with the ODC 8(a) contract. This meeting was called to resolve questions concerning contract costs and possible breach of ethics.

The above resulted in two meetings that included parties to the contract and Legal Counsel as well as myself. The first meeting was attended by all parties to include Attorney William Richardson, Assistant Chief of the Legal Department. Following this meeting, Attorney Carroll Dicus was assigned this action and was present at the second meeting.

To the best of my knowledge, Attorney Dicus continued in the assignment until he was appointed a Hearing Examiner for NASA-Board of Contract Appeals.

Arthur Wolter Jr. Esq.

WARREN M. THRAILKILL
Certified Public Accountant
2509 Newby Road, S.W.
Huntsville, AL 35805

August 22, 1991

Memo: DCAA's Suggestion/Discussion for Separating On-Site Project O/H from Off-Site Operations O/H Pool and the DCAA Adjusted Equitable O/H Rate of 145.7%

This memorandum is another supplement to the one dated Nov. 25, 1975 and subsequent to that one dated June 18, 1979.

Our memorandum of Nov. 25, 1975 explained our action re Optimal Data Corporation's overhead separation. This was a result of a conference with DCAA's auditors and not from any written instructions such as contained in DCAA Audit Report of Oct., 1973 and not issued to Optimal. In June 1975, DCAA's audit was conducted in close coordination with our office and concluded at Auditor Haley's direction with "Summary of Cost By Projects" -- depicting clearly Optimal's segregated cost accounts.

In Nov. 1973, DCAA Auditor Walker visited our office specifically for the implementation of DCAA's instruction on overhead separation.

The memorandum of June 18, 1979 addressed our adjustment of overhead rate due to an allocation of payroll taxes and group insurance costs, as suggested by Auditor Haley. This resulted in a final overhead rate of 145.7% for year 1974 which was submitted in Aug. 1975 to DCAA. In the meeting of Aug. 29, 1975 mentioned in my memorandum, no question was ever

raised by DCAA in response to SBA's inquirer, Mr. O'Donnell, regarding the DCAA's adjusted overhead rate of 145.7%.

I have no record or recollection of knowing this overhead being recomputed to be 50.2% composite overhead rate by the DCAA Auditor Haley. I, as Optimal's CPA, should have been consulted and Optimal's complete cost data in our office should have been used.

Optimal's documentation of events and its cost data reflect its sincerity of presenting the events and its unusual cost consciousness in the contract performance for which technical officers highly praised, as record disclosed, thus Optimal's reimbursement is long over-due.

This is being recorded as further reflections on events outlined in previous two memorandums from our office.

Warren M. Thrailkill
Certified Public Accountant

t/

Annotation of Memo by CPA W. Thrailkill (Optimal vs US Appls Ct.-Fed Cir 91-5070)
Re: Paragraphs 1, 2, 3:

This is the third memorandum written by CPA, Warren Thrailkill, first reaffirming the certified statements of the previous two memorandums, all bearing legally certifying validity. (SAF 22A & 31, on APP.48 & 63 respectively). In BCA Findings of Fact (FOF.15), Judge Dicus called it Optimal's Accountant, Warren Thrailkill's letter, to conceal the legal validity of CPA's statement. Then, he mistakenly criticized the memorandum "no mention of separate O/H pools, just the separation of O/H costs for identifica-

tion." While the memorandum was actually titled "...O/H pool". Had DCAA issued the 1973 pre-award audit report to Optimal as it should, its instruction "... separate O/H pool should be established." (SAF.22B, APP.48) would be unconcealed, obviating the first memorandum to prove the effect of such DCAA instruction. However, the DCAA instruction was unearthed in September 1977. Furthermore, besides the instruction for O/H separation, DCAA auditor Walker inspected the implementation of such O/H separation in November of 1973, right after the start of WFC contract. (SAF.22A, APP.48)

At the conclusion of DCAA's audit in June, 1975, "Summary of Cost by Projects" was achieved under close supervision of DCAA auditor, Haley -- a concrete proof of Optimal's segregated cost accounting (SAF.28, APP.58). Above all, such separation of O/H cost is mandatorily required for different operations, such as On-site and Off-site in instant case, based on Equitability Principle.

Re: Paragraphs 4 & 5:

The DCAA auditor Haley's suggestion for adjusting O/H rate from 164.8% to 145.7% was complied with precisely as shown on SAF.6, APP.19, which was finalized and submitted. Auditor conceded to CPA, no further adjustment can be found. And no question had ever been raised by DCAA in response to SBA designated inquirer on DCAA audit in the August 29, 1975 meeting. From August to October, under GSFC's influence and hesitation, auditor Haley went to recompute the composite O/H rate, inequitable and with gross errors, arriving at 50.2%. Such DCAA recomputation and submission in Opt-

imal's behalf of the composite O/H rate, inequitable and grossly erroneous, especially being without Optimal CPA's consultation or coordination, or the use of its full cost data, has evidently exceeded its right to inspect and examine, according to NASA audit regulations. Besides, such DCAA action was proven capricious in defying its own instruction, its own adjusted O/H rate, and the mandatorily required segregation of O/H costs for the equitability of different operations, let alone the effect of victimizing Optimal, the Minority contractor crusading for altruistic management.

Re: Paragraphs 6 & 7:

It is of national interest to note, Optimal's altruistic management with unusual cost consciousness and technical conscientiousness had been of intrinsic determination since 1969 under the motivation of NASA's Cost Reduction Program. (SAF.19,24,26,32,APP.40,51,54,64 respectively; and Prologue IC, APP.106-111)

Prepared by Dr. Lincoln Teng, Dir. Optimal Data Corp., with attachment of 2 crucially important documents for supporting evidence.

Supp. Tab. No. 3 NASA BCA NO.976-8

AGENDA FOR ODC SOLO SYMPOSIUM
PLACE/VANGUARD DATA REDUCTION STUDY
(9:30-12:00 a.m. November 7, 1973)

TABLE OF CONTENTS

1.0 INTRODUCTION (Teng & Leibfried)
- 1.1 Objectives of PLACE
- 1.2 Objectives of PLACE/Vanguard
- 1.3 Theory of Position Fixing
- 1.3.1 PLACE Geometry
- 1.3.2 System Configuration
- 1.4 R.F. Signals
- 1.4.1 Spectrum
- 1.4.2 Signal Strengths & Undulations

2.0 ANALYSIS (Leibfried & Samant)
- 2.1 Data Communications
- 2.1.1 Command and Control Signal
- 2.2 Voice Communications
- 2.3 Vehicle Position Determination
- 2.3.1 Ranging
- 2.3.2 Position Determination Algorithm
- 2.3.3 Position Determination Geometry
- 2.3.4 Newton Raphson Solution
- 2.3.5 Kalman Filter Solution
- 2.3.5.1 Heuristic Representation
- 2.3.5.2 Basic Kalman Equations
- 2.3.5.3 Position Determination Program's Deficiencies
- 2.3.5.4 Off-Line Remedial Actions
- 2.3.6 Effect of Bias Errors Upon Latitude and Longitude

3.0 CONCLUDING REMARKS(VandeLinde/Samant)
- 3.1 Simulation Results and Analysis
- 3.2 Software Systems Evaluation & Recommendations

<u>Optimal Project Personnel</u>:

Dr. Lincoln Teng, Dr. David VandeLinde
Dr. Vivek Samant, David Woodruff
Dr. Theodore F. Leibfried, Jr.

<u>NASA-GSFC Technical Monitors & Associates</u>

Dr. A. Ghais, S. Wishna,R. Waetjen,
W. Allen, J. Christo & D. Brandel

RECAPITULATION FUNDED/NOT-YET FUNDED COSTS FOR ORIG STIPULATED/ADDED TASKS FOR PHASES I AND II

Phase/ Task/ Mod.	Approved Cost Estimate	Amount Funded	Amount Not Yet Funded	Comments	References
IA	$ 24,600		$ 24,600	Curtailed by "curtailment Scheme" but completed as requested. ODC symposium not recognized or funded	See Supp.Tabs 2&3 & Claim V.
IB	34,800	$ 30,800	4,000		See Supp. Tabs 2&3
IA & IB	$ 59,400	$ 30,800	$ 28,600		
II	$208,258			(See Comment below-listing of Major Tasks not-yet Funded)	See Supp.Tab 4 p1,2
Mod. 1		$ 99,610			See Supp.Tab 4 p1,4
Mod. 3		30,564			See Supp.Tab 4 p1,2
	$208,258	$130,174	$ 78,084	ODC completed these curtailed tasks as pre-requested although not-yet funded, proving GSFC's systematic practice of "curtailment scheme". Most conservative cost possible. Not included in approved costs for originally stipulated tasks. Task approved but cost not adjudicated.	
ODC Monitor Design	$ 35,000		$ 35,000		Supp.Tab 4, p1,2
II Added Effort Mods.2,4,5 7 & 8	$*59,098	$ 59,098		Approved Overrun Costs for added task & effort expended on funded tasks stipulated in originally approved cost estimate. None of this cost is for added costs entailed by not-yet funded tasks of Phase II.	*See Supp.Tab4 p1 & *Individual amts of these Mods. follows Mod 2 - $15,433 Mod 4 - 20,651 Mod 5 - 15,248 Mod 7 - 2,992 Mod 8 - 4,774 TOTAL: $59,098
II	$302,356	$189,272	$112,084	Phase II, included all tasks and added effort of Phase II.	
I & II	$361,756	$220,072	$141,684	Total amt. of itemized claims based on specific records is $137,741 vs unpaid gov't T.O. adju.cost $141,684; ODC'S system (cost 361,756, rec'd 220,072 only in 1973-1975) replaced BELL AERO's system (cost $/00,000 in 1971-73, prior to Energy Intiation)(Cost Estimates do not include Fixed Fees)	(The contract & all mod exhibited in AP Tab 1 thru 9.)

LISTING OF ODC'S MAJOR TASKS NOT-YET FUNDED
(performance acknowledged and praised but no funds adjudicated)

Phase I:
1. Review of Bell Aero's PLACE System Documentation--Task IA. (Supplement Tabs 2 & 3)
2. ODC's Solo Symposium for GSFC to acquire project funding. (Supplement Tab 3, p. 6).

Phase II:
3. Design of ODC PLACE Software System Monitor. (Supp. Tab 19,p.1; &4, pp. 1&2).
4. Improving the operating system. (Supplement Tab 4, p. 7).
5. Recoding-reprogramming for minimizing core utilization. (Supplement Tab 4, p. 7).
6. Documentation of Simulation Tests. (Supplement Tab 4, p. 1, etc.).
7. GSFC Monitor Training (Brandel) on ODC's PLACE Software System operation & design--far beyond contract specification. (Supplement Tab 23, etc.)
8. Others-inc. numerous/varied minor tasks, verbally ordered by GSFC T.O's (Wishna & Brandel). Since Jan '75, ODC's Proj. Mgr. began declining such minor task orders w/o added funding; each time, the Proj. Mgr. told T.O's to contact ODC's Dir. to negotiate necessary funding first. Brandel didn't make such contacts. From the subject project start til Jan '75, GSFC succeeded in verbally ordering extra tasks w/o addl funding. And, tho ODC exerted extra effort to oblige such unreasonable orders, when it was apparent Gov't didn't intend to award follow-up contract to ODC, ODC's key proj. personnel became disenchanted and had no incentive to continue such folly. Only then GSFC ceased/resisted their unreasonable/unjust tactics.
9. Not-yet Funded Subtasks (1.5,1.7,1.8,1.12,2.1,2.5,3.1,3.2,&4.1, 5.1)(Supp. Tab4,p.1,3-5) all, w/Task IA, performed under GSFC Task Curtailment (Supp.Tab 2&3).
10. Subtasks 2-8 above performed under GSFC's coercion w/o adjudicating change orders--a series of breach of contract by GSFC in addition to tasks in 9 above.

A "Supreme" Contractual Clause for Cost Reimbursement:
172. ALLOWABLE COST, FIXED FEE AND PAYMENT (SEPTEMBER 1973)
(a) For the performance of this contract the Government shall pay to the contractor:
....
(g) Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by reference, designating services to be performed or materials to be furnished by the Contractor at his expense or without cost to the Government.

Apls Ct-Fed 91-5070
SAF:Tab.2,p.1 of 3

TELEGRAPHIC MESSAGE

Name of Agency
GSFC, GREENBELT, MARYLAND
ATTN: SHELDON WISHNA 301-982-5380
VIA: DORIS FLEMING 301-982-6871

Confirming verbal cost negotiation with GSFC's Wishna:

OPTIMAL DATA CORPORATION RESPECTFULLY SUBMITS BUDGETARY INFORMATION REGARDING DATA REDUCTION TASK IN SUPPORT OF USNS VANGUARD/PLACE PROJECT FOR NASA-GSFC.

PHASE IA MAY TO JUNE 30, 1973,
BUDGET ESTIMATE: $24,600
(APPROXIMATELY 4-MAN EFFORT).

PHASE IB JULY 1 TO SEPTEMBER 30, 1973,
BUDGET ESTIMATE: $34,800.

PHASE II COMMENCE OCTOBER 1, 1973, COST ESTIMATE BASED ON CPFF CONTRACT, USING THE ESTABLISHED DIRECT LABOR RATE AND OVERHEAD OF PHASE I ELIMINATING OVERTIME LABOR COST AND OTHER "CRASH-PROGRAM" SPECIAL EXPENDITURES. ABOVE ESTIMATES ARE SUBJECT TO GSFC-SBA OFFICIAL'S MODIFICATION AND APPROVAL.

Name & Title of Originator:
LINCOLN TENG, PH.D., DIR., ODC
Originator's Tel. No.:
837-1541
Date and Time Prepared:
5-16-73 1:00 P.M.

Supplement Tab.No. 3 NASA BCA No.976-8 Apls Ct-Fed 91-5070

GSFC Technical Officer, Mr. S. Wishna's Hand-written Cost Estimate in Manhours

Month:	Oct.					Nov.	
Day:	28	5	12	19	26	2	9
Type	Hours						
Project Manager	16	16	16	16	16	16	12
Project Eng	40	40	40	40	40	40	24
Assoc. Proj Eng	40	40	40	40	40	10	8
Computer Specialist	16	16	16	16	16	16	8
Computer Tech	20	20	20	20	20	20	0
Programmer	24	24	24	24	24	24	0
Data Analyst	40	40	40	40	40	40	8
TOTAL	196	196	196	196	196	166	60

Total hours additional to complete date reduction, prepare final report and make presentation.

Supp. Tab. No.4--Pl. of 7

Project Budget and Progress Control Record
Record of Proposed and Completed Tasks
PLACE Software Modification

Apls Ct-Fed 91-5070
NASA BCA No. 976-8

TASK	Proposal Dec. 1973 Orig/Revis'd		Completion Status	Proposal Overrun Apr.'74	Proposal Add'l June'74	Compl. Status	Over-run Aug.'74	Status	Over-run Dec.'74	Status
1. SOFTWARE DEVELOPMENT										
1.1 Review	X	X	YES							
1.2 Control Software	X	X	NO	X		YES				
1.3 Position Determination	X	X	NO	X		YES				
1.4 Trilateration	X	X	NO	X		YES				
1.5 Calibration	X	-								
1.6 D^3P Link	X				X	YES				
1.7 Data Reduction	X									
1.8 Evaluation & Revision	X									
1.9 GE-data Receive Software	-				X	NO				
1.10 MARAD output	-				X	NO				
1.11 NAFEC output	-				X	NO	X	YES		
1.12 Improve Accuracy of LOCATE	-				-				X	YES
2. INTEGRATION										
2.1 Control Software	X									YES
2.2 Simulation for Control Software	X						X	NO		YES
2.3 Test Control Software	X				X	NO	X	NO		YES
2.4 Locate and Trilat	X						X	YES		YES
2.5 Simulation Tests	X									YES

PAGE 32

Supp. Tab. No.4--Pl. of 7 -- Project Budget and Progress Control Record - (CONTINUED)

TASK	Proposal Dec. 1973 Orig/Revis'd		Completion Status	Proposal Overrun Apr.'74	Proposal Add'l June'74	Compl. Status	Over-run Aug.'74	Status	Over-run Dec.'74	Status
3. DOCUMENTATION OF SIMULATION TESTS										
3.1 Simulation Test Plan	X									
3.2 Siminulation Software	X									
3.3 Simulation Operator's Manual	X									YES
4. DOCUMENTATION										
4.1 Test Plan	X	-								
4.2 Documentation	X	X	NO	X		NO	X	NO	X	YES
4.3 Operator's Manual	X	-								
4.4 Description	X								X	YES
4.5 PLACE EXEC DOC	-				X	NO			X	YES
5. ACCEPTANCE TEST & SUPPORT										
5.1 Tests	X									YES
5.2 Support and Training	X				X	YES			X	YES
Proposed: $208,258* (all tasks)				$15,433	$34,905		$24,416		$16,125	
Aproved: revised $99,610				$15,433	$34,364		$20,651		$15,248	

*Note: The minimized cost $208,258 on App.10 (final approved cost proposal) does not include monitor reconst., constructive changes for resumed curtailed tasks, and any added tasks.

App.33

ODC PROVISIONAL CONTRACT COST DATA

RE: CONTRACT: _____
TIME PERIOD: _____

COST ITEMS	PAYEE	CHECK#	AMOUNT	REMARKS
No. 1 Direct Material - - -				
No. 2 Material Overhead (% of No. 1)				
No. 3 Direct Labor - - -				
No. 4 Labor Overhead (% of No. 3)				
No. 5 Special Testing				
No. 6 Special Equipment				
No. 7 Travel - - -				
No. 8 Consultants - -				
No. 9 Other Direct Costs - -				
No.10 TOTAL DIRECT COST AND OVERHEAD				
No.11 General and Administrative Expense (% of Nos.)				
No.12 Royalties				
TOTAL ESTIMATED COST				

Note: 1) CCD be used for monitoring, control & pre-audit; may be certified. 2) CCD cost itemization is completely based on Form DD633/533.

EXTRACT OF MEMORANDUM

Supp.Tab.No.19,p.1-5 Apls Ct-Fed 91-5070
NASA BCA No. 976-8

Date: April 30, 1975

To: James R. Higgins
Code 289.1

From: Daniel L. Brandel
Code 953

"Subject: Response to the Optimal Data Corporation (ODC) letter dated March 19, 1975, Contract NAS5-21941

Before responding to the letter from Dr. Teng, I would like to express my satisfaction with the technical performance of ODC under this contract. Despite the hardships imposed on ODC by the shortage of government furnished computer time and documentation from the previous PLACE program efforts, Dr. Teng succeeded in assembling a highly original and creative team headed by Dr. Vandelinde of Johns Hopkins University. The other team members, Dr. Samant, Dr. Loh, and Jeff Rothman are to be commended for their dedication, hard work, and persistence in building a working set of software which performed a number of difficult computation and experiment control sequences in real-time."

Note: Entire copy of Brandel's memorandum can be found in Appellant Appendix, APP.40-44.

APPENDIX

EXTRACT OF ODC SUPPLEMENTARY APPEAL FILE (SAF) LISTING

(Ref. ODC Supplemental Appeal File and Annotations)

C.L.Ct. File #760-85C Re: NAS-5-21941

Tab#	Title/Content	App.#
2	Confirmation by GSFC T.O. Wishna, Cost adjud. for Tasks 1A & 1B.	-3-
3	GSFC Re-adjud. of Task 1A funding by Wishna's hand-written Form 533.	-5-
4	Approved Cost/Funds for Phase II (Main Task).	-9-
5	Project Performance Time Records & Work Hrs. Tab.	-11-
6	Voucher 34 and Supporting (O/H and G&A Rates Computations, O/H and GSA Balance Due ODC) Memo Regarding DCAA's Instructions for separation of O/H, DCAA adjusted O/H: 164.8% to 145.7%.	-15-
7	Contract Payment Record, Showing Funding Gaps when project work supported on O/H.	-21-
9	A. ODC Contract Cost Data Sheet (Unique Contract Cost Control and Monitoring Instrument. B. Some Doctrines of Small Business Operations.	-24-

11	Memo of DCAA Mtg. with SBA-assigned Mgmt. Consultant re DCAA Audit of ODC's GSFC Project, Aug. 29, 1975.	-26-
13	GSFC Div. Chief's Approval to Publication of ODC Technical Report; singularly required form.	-29-
14	Voucher 36 and Supporting Document.	-31-
15	SBA's Designated Auditor debunked DCAA's Audit Report.	-33-
17	Extract of ODC Policy & Procedures, showing ODC Accounting System with Itemized and Identified codes in a Cost Segregation Structure.	-37-
19	GSFC Ltr (Brandel to Higgins) Response to Dr. Wolter's Inquiry.	-40-
20	Rejecting ODC's Proposal to Cost Factors first, defying SBA SOP to open 8(a) contract follow-on task for bid.	-45-
21	Extract of DCAA File Re DCAA's Audit of ODC's 1972 O/H (155%) & G&A (16%) for Pre-award audit of WFC On-Site service Contract (Proposed O/H 47%,G&A 10%).	-46-
22	A. CPA Thrailkill's Memo Regarding DCAA Instruction for O/H Segregation of On-Site from Off-Site O/H Pool.	-48-
	B. An Extract of DCAA Report	-48-

(Concealed by DCAA from 1973 to 1977), for Establishing O/H Pool for WFC On-Site project.

C. Extract of SBA on pre-det. -49-
False Grounds by Ex. A&B above.

23 Extract of Modification No. 3 -50-
--Stipulation of Training, T.O., Brandel misrepresented as supporting personnel.

24 ODC President's W2 Forms, -51-
(altruistic earnings).

26 Extract of DCAA File: ODC's -54-
Declining to Claim Actual O/H and G&A. Auditor Walker's Hand-written report noted Govt. not legal to allow ODC's donation or contribution of $42,713 on NASA 26111.

28 Audit Summary Sheet--Summary -58-
of Cost by Projects for 1974.

29 Clause 172(G) "Supreme Clause" -59-
for Reimbursement in Subject Contract; Clause 217 for interest payment.

30 Extract from GSFC & SBA -60-
Corresp. Commending ODC's Technical Capability While Complaining Capriciously ODC's Inability to Propose Contract Cost; GSFC C.O., Keefe requested predetermined decision from SBA.

31 Affid. by J. O'Donnel, SBA -62-
Assigned Auditor and by CPA, Thrailkill, showing DCAA's caprice.

32 Recapitulations--Project Funding Status, Funding Gaps, Funded and Unfunded Tasks. -64-

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Affidavit by Teng, Director of Optimal Data Corporation App.65A

Part A. Answers to BCA Judge adopted GSFC's Issues of Fact A1 - A12.....App.66

Part B. Answers to BCA Judge adopted GSFC's Issues of Law B1 - B8.....App.94

A Compendium of Prologues:.....App.101A, ...102-119

I-A Chronological Events of ODC's GSFC PLACE Project

I-B Highlights of Major Features of Subject Contract

I-C Unique Virtues of ODC Altruistic Management

II-A GSFC PLACE Project Funding Status from 1972 to 1978

II-B Recapitulation of Funded and Not-yet Funded Costs/Tasks

II-C Categorized Listing of Not-yet Funded Tasks

III-A Definitions and Basic Formulae for O/H and G&A Rate Computation

III-B Basic Truths Concerning Indirect Cost Segregation

III-C Proofs of DCAA's Inequity & Errors and ODC's Equity & Merits in O/H Computations (besides DCAA's fraud in concealing instruction for separating O/H of different operations and capriciousness in acting contrary to DCAA own instructions, defying basic principles of equitability.

NOTE: Refer to Appendix for Optimal Data Corporation, Appeal No. 91-5070.

APPEAL FILE LISTING (Compiled by GSFC)

ODC Appeal Apls Ct-Fed 91-5070
Re: NAS 5-21941

1. Basic contract - NAS5-21941 (June 22, 1973)
2. Modification No. 1 (Jan. 24, 1974)
3. Modification No. 2 (Mar. 12, 1974)
4. Modification No. 3 (June 14, 1974)
5. Modification No. 4 (Oct. 9, 1974)
6. Modification No. 5 (Feb. 6, 1975)
7. Modification No. 6 (Feb. 26, 1975)
8. Modification No. 7 (Aug. 8, 1975)
9. Modification No. 8 (Apr. 30, 1976)
10. Memo from Tec. Div. Chief to C.O. (Feb. 26, 1974) appointing new T.O.
11. Mon. Progress Rpt (July 11, 1974), ODC informs GSFC funds expected to last thru Oct. 1974 will only last thru July 24, 1974.
12. DCAA's review of ODC timekeeping procedures, controls, and practices (September 23, 1974)
13. Ltr from T.O. to DCAA (Jan. 27, 1975) stating probable authenticity of claimed labor hours
14. ODC ltr to A. Wolter (GSFC Small Business Specialist) (Mar 19, 1975)
15. Memo from T.O. to Contract Negotiator (Apr. 1, 1975) stating final report draft sufficient and final copies should be cancelled
16. ODC ltr to C.O. (Apr. 25, 1975) submitting final copies of final rpt.
17. T.O. memo to C.O. (Apr 30, 1975) responding to letter of Mar. 19, 1975
18. ODC ltr to C.O. (June 19, 1975) submitting first vague claim
19. C.O. ltr to ODC (July 23, 1975) requesting addl info on claim, with July 2, 1975 ltr from ODC

20. Ltr from C.O. to SBA (Aug. 4, 1975) describing situation
21. Contract Negotiator ltr to SBA (Aug. 14, 1975) providing back-up documentation
22. ODC ltr to Dr. M. Vaccaro (GSFC Assoc Dep Dir) (Aug 29, 1975) reiterating claims & complaints of Governmental slowness -- made blacklisting charge
23. ODC ltr to C.O. (Aug. 29, 1975) reiteration of claims
24. SET, Inc. ltr & rpt to SBA (Sep. 10, 1975) reporting assistance rendered ODC by SBA-appointed management consultant firm
25. ODC ltr to Dr. Vaccaro (Sep 12, 1975) providing addl documentation
26. Dr. Vaccaro ltr to ODC (Sep 16, 1975) responsing to Aug 29, 1975 ltr.
27. C.O. ltr to ODC (Sept. 17, 1975) responding to Aug. 29, 1975 ltr.
28. Dr. Vaccaro ltr to ODC (Sep 22, 1975) responding to Sep 12, 1975 ltr.
29. ODC ltr to C.O. (Sep. 24, 1975) responding to Sep 17, 1975 ltr.
30. ODC ltr to Dr. Vaccaro (Oct 6, 1975) responding to Sep 16, 1975 ltr. citing "coincidental" rejection of competitive proposal
31. Dr. Vaccaro ltr to ODC (Oct 15, 1975) responding to Oct 6, 1975 ltr.
32. DCAA audit (Oct. 21, 1975)
33. SBA ltr to C.O. (Nov. 28, 1975) concurring with DCAA audit and forwarding SBA consultant's report
34. ODC ltr to Dr. J. Clark (GSFC Dir.) (Dec. 15, 1975) reiteration of claims
35. R.M. Keefe Head, Applications Support Ofc, memo to C.W. Shorter (P.O.) (Jan 29, 1976) re Jan 22, 1976 mtg.
36. ODC ltr to R.M. Keefe (Jan 29, 1976) responding to Jan 22, 1976 mtg.

37. ODC ltr to R.M. Keefe (Feb. 25, 1976)
38. R.M. Keefe memo to R.V. Strong (Fin. &
    Price Anal. Br.) (Mar. 5, 1976) requesting J. Chovan review ODC labor hours
39. R.M. Keefe LTR to ODC (Mar 5, 1976) requesting additional info for, and cooperation with, J. Chovan
40. ODC ltr to R.M. Keefe (Mar. 10, 1976)
41. R.M. Keefe ltr to ODC (Mar. 11, 1976)
42. ODC ltr to R.M. Keefe (Mar. 18, 1976) responding to Mar. 11, 1976 ltr.
43. ODC ltr to J. Chovan (Mar. 18, 1976) providing required information
44. Memo from J. Chovan to Contract Negotiator (Mar. 25, 1976)
45. R.M. Keefe ltr to ODC (Apr. 12, 1976) concerning Modification No. 8
46. Honorable R.E. Jones (Rep. of AL 5th Dist.) ltr to W. Sturdevant (NASA/ Legislative Affairs Officer) (Apr 15, 1976) enclosing letter from ODC
47. ODC TWX to R.M. Keefe (Apr. 21, 1976) requesting immediate payment of remainder of Voucher No. 33
48. J. Allen (NASA Asst. Admin. for Legislative Affairs) Apr. 23, 1976 ltr to R.E. Jones responding to Apr. 15, 1976 ltr.
49. R.E. Jones ltr to J. Allen (June 15, 1976) forwarding ODC Jun 4, 1976 ltr.
50. R.M. Keefe and A.D. Payne, Jr. (C.O.) ltr to SBA (June 18, 1976) requesting C.O.'s decision from SBA
51. SBA ltr to ODC (July 1, 1976) making C.O.'s decision
52. SBA ltr to A.D. Payne (Aug. 5, 1976) forwarding motion of appeal dated July 27 and received July 30, 1976
53. W.J. Malyszer (ODC attorney) ltr to R.M. Keefe (July 30, 1976)

reiterating claims

54. R.M. Keefe ltr to W.J. Malyszer (Aug. 25, 1976) responding to Jul 30, 1976 ltr.
55. C.W. Shorter memo to F.L. Lees (NASA/ Board Contract Appeals)(Sep 7, 1976) forwarding ODC notice of appeal, with memo from A.D. Payne to C.W. Shorter forwarding notice of appeal for transmission to NASA/Headquarters

NOTE: As earlier reported, U.S. Cl. Ct. on proceedings, Government Appeals File (AF) could not be found in Clerk's office in a complete, consecutive, and indexed manner (Folder 1-16).

INDEX OF PREHEARING CONFERENCE FILE

(In a bound folder with complete set, but not so in the file folders stored in Claims Court Clerk's Office #760-85C)

Item

1. Basic PR
2. Basic Proposal
3. Basic Tech Eval
4. Basic Pre-Neg. Plan
5. Basic Summary
6. All Review Sheets
7. #1 PR
8. #1 Proposal
9. #1 Tech Eval
10. #1 Pre-Neg. Plan
11. #1 Summary
12. #2 PR (Fully Funds #1)
13. #3 PR
14. #3 Proposal
15. #3 Tech Eval
16. #3 Pre-Neg. Plan
17. #3 Summary
18. #4 PR
19. #4 Proposal
20. #4 Tech Eval
21. #4 Pre-Neg. Plan
22. #4 Summary
23. #4 Signatory Authority
24. #5 PR
25. #5 Authority to Negotiate
26. #5 Proposal

INDEX OF RECORD
(In Clerk's Office of U.S. Claims Court)

File No.	Description
Folder:	
1 of 16	July 27, 1976 to Mar. 11, 1977
2 of 16	Mar. 17, 1977 to Sept. 19, 1977
3 of 16	Sept. 22, 1977 to Jan. 20, 1978
4 of 16	Jan. 27, 1978 to Dec. 29, 1978
5 of 16	July 12, 1979
6 of 16	Dec. 15, 1978 to Mar. 6, 1980
7 of 16	BCA No. 976-8 Supp. Evidence
8 of 16	Government Affidavit's (sic) File NAS5-21941 NASA BCA No. 976-9
9 of 16	Government's Brief on the Record
10 of 16	Appellant's Brief for Appeal Reconsideration
11 of 16	Appeal Supplement File by Appellant
12 of 16	NASA BCA No. 976-8 Appellant's Brief (NC-78-047)
13 of 16	Optimal Data Corporation NAS5-21941 Appeals (sic) File (1 of 3)
14 of 16	Optimal Data Corporation NAS5-21941

Appeals (sic) File (2 of 3)

15 of 16 Optimal Data Corporation
NAS5-21941
Appeals (sic) File (2 of 3)

16 of 16 Pre-Hearing Conference File
NAS5-21941 BCA No. 976-8

NOTE: This table shows the separately bound 16 folders containing documents in a chronological order in a carton box, besides a soft-folder containing all documents filed, to and by, Claims Court (760-85C). However, there is no complete set of Appeal File (AF), nor pre-hearing conference file (PHF), let alone the Tab #'s or Index #'s as NASA-BCA recorder, Ms. Grimes wrote to Director Cohen of Justice Department, April 29, 1986, which was filed in the soft folder in a chronological order, as reported to Appellee's counsel earlier. However, Appellant's Supplementary Appeal File (SAF) is complete in folder. Also, Optimal has complete sets of AF & PHF, bound with indexed tab #'s.

APPEAL OF OPTIMAL DATA CORPORATION (ODC)
CONTRACT NAS 5-21941/SB 242-8(a)-73-6-225
NASA BCA No. 976-8

COMPLAINT

TABLE OF CONTENTS

		Page
	Highlights of Major Features of Subject Contract	ii
I.	Complaint Regarding Voucher 33B (attached)	I-1 to I-5
	Specifications	
	ODC's Supporting Contentions--Concerning Complaint No. 1	
II.	Complaint Regarding Voucher 34--Substantiating Documents Submitted Herein (Ex.2A-2D)	II-1 to II-9
	Specifications	
	ODC's Supporting Contentions--Concerning Complaint No. II.	
III.	Complaint Regarding Vouchers 35 and 37 (attached)	III-1 to III-7
	Specifications	
	ODC's Supporting Contentions--Concerning Complaint No. III.	
IV.	Complaint Regarding Voucher 36 (attached)	IV-1 to IV-5
	Specifications	
	ODC's Supporting Contentions--concerning Complaint No. IV	
V.	Summarization	

THE APPELLANT'S REPLY

TABLE OF CONTENTS

		Page
Highlights of Major Features of Subject Contract		i-1 to i-8
I.	COMPLAINT I - Regarding Payment Due ODC Vouchers 33B, $1,190.28	I-1 to I-5
II.	COMPLAINT II - Regarding Payment Due ODC Voucher 34, $55,141 32	II-1 to II-3
III.	COMPLAINT III - Regarding Vouchers 35&37 for Payment of $32,489.00 due ODC	III-1 to III-2
IV.	COMPLAINT IV - Regarding Voucher 36 for O/H and G&A Balance for 1975 in the Amount of $30,892.01 due ODC	IV-1
V.	COMPLAINT V - Regarding ODC's Extraordinary Effort from Sep to Nov 1973 in the Amount of $18,029 due ODC	V-1 to V-2
SUMMATION		S-1 to S-6
CONCLUSION		C-1

Prepared and Submitted
by
OPTIMAL DATA CORPORATION

Lincoln Teng, Ph.D., Director & President
Chief Legal Advisor:
Walter J. Malyszek, Attorney-at-Law
JMJ Government Contract Specialist
February 25, 1977

SUBJECT: OPTIMAL (ODC) APPEAL RELATING TO VOUCHER 34 OF ODC CONTRACT NAS 5-21941 SBA 424-8(A)-73-6-225

DETAILED INFORMATION IN SUPPORT OF SUBJECT APPEAL

TABLE OF CONTENTS

Item	Description	Page
1	Clarification of ODC Voucher 34 Claiming 1973-74 O/H in the Amount of $55,141.32	1
1.1	SBA Statement Erroneous	1
1.2	SBA Statement Illogical	3
1.3	Basic Considerations of	3-4
2	Substantiation of ODC Voucher 34 for 1973-74 O/H Differences in Amount of $55,141.32 due ODC by NASA-GSFC	5
	Substantiating Documents:	
	Ex. 2A 1973 Comp. ODC O/H and G&A rates	5
	Ex. 2B 1974 Comp. ODC O/H and G&A rates	5
	Ex. 2C '73 & '74 Comp. O/H and G&A Differences	5
	Ex. 2D Copy of Voucher 34 for $55,141.32	5
2.1	The above documents (Ex.2A-2D) submitted to DCAA Auditors and SBA-assigned Management Consulting Auditor	5
2.2	All figures contained in above documents were studied and examined by all auditors with ODC's CPA, and no questions raised by anyone concerning these specific figures	5

Item	Description	Page
2.3	Ex. 2A,2B,2C were all verified and documented as Sched. A,B,C, respectively, in SBA-assigned Management Consultant Audit Report (Exhibit 1A, herein)	5
2.4	DCAA Audit Report acknowledged all ODC submissions	6
3	Clarification of Issues and Supporting Evidence	7
3.1	Clarification of Basic Issues	7
3.2	Evidence and Proof of Separability of On-Site O/H costs	7
3.2.1	Main Evidence	7
3.2.2	Additional Evidence	8
(1)	Independent & Autonomous On-Site Proj. Time Records	8
(2)	DCAA Had Wherewithal for On-Site O/H Rate Computation	8
(3)	Cost Distribution by Projects Sheet	8
(4)	SBA-assigned Auditor's Report (Confirming Separation)	8
3.2.3	Integrated vs Segregated O/H	9
3.2.4	Mathematical Proof of Distortion & Errors in DCAA's Integrated O/H Rate	10
Notes regarding DCAA Integrated O/H Rate:		
(1)	O/H Labor Main Portion of O/H Costs, Erroneously	11
(2)	Further Aggravation of Gross Distortion of O/H Rate Derived by DCAA, having authority of inspection only.	11
(3)	DCAA has no right to submit O/H computation on Optimal's behalf without CPA coordination & the use of Optimal's full cost record.	11

PROLOGUE

Opening Statement: With utmost respect for the fundamental principles, basic truths, simple facts, and all corroborating evidence, presented in this Appellant's Brief for Appeal Reconsideration (BFAR), Appellant submits a total of nine Prologues, I-A thru I-C; II-A thru II-C; III-A thru III-C to enhance the significance of their contents and to facilitate the perusing and examining of the issues in instant Appeal and to help clarify controversial matters and resolve conflicting allegations, as listed below:

Prologue

I-A	Chronological Events of ODC's GSFC PLACE Project
I-B	Highlights of Major Features of Subject Contract
I-C	Unique Virtues of ODC Altruistic Management
II-A	GSFC PLACE Project Funding Status from 1971 to 1978
II-B	Recapitulation of Funded and Not-Yet Funded Costs/Tasks
II-C	Categorized Listing of Not-Yet Funded Tasks
III-A	Definitions and Basic Formulae for O/H and G&A Rate Computation
III-B	Basic Truths Concerning Indirect Cost Segregation
III-C	Proof for Meritorious Equitability of ODC O/H rate

Overview: This BFAR is logically organized, starting with Book I, Grounds

for Appeal Reconsideration, then going into Rebuttals of Appeal Judge's Findings of Fact (FOF) in Book II. These rebuttals are presented in the same order of Judge Dicus' 58 Findings. Finally, Appellant outlines Objections to Appeal Judge's Decisions. These Objections are derived from the relevant facts and are compiled in Book III. In addition, for facilitating a complete review of instant Appeal, Appellant submits Book IV, Supplementary Supporting Documents, consisting of two parts:

Part A - Appellant's Contentions and Proofs regarding BCA-Designated Issues; and,

Part B - Appellant's Debunking of Respondent's Allegations. Appellant's debunking is supported by corroborating evidence and proofs.

Closing Statement:

- Confucius taught us altruism;
- Jesus guides our conscience of justice; and
- God is the Supreme Judge of all !!!

APPELLANT'S MOTION FOR SUMMARY JUDGEMENT

Based on the crucial evidence exhibited in Prologue II-C* (Categorized Listing of Not-yet Funded Tasks), and in Book I (Grounds for Reconsideration) Ground 1**, herein, Appellant pleads to the Board for an immediate Summary Judgement, in consideration of the fact

that the Not-yet Funded Tasks constitute a breach of contract by GSFC unless Change Orders are adjudicated or equitable adjustment is made to Appellant via the Board's just decision.

If the Board grants this Motion, it will obviate the agony of reviewing rebuttals contained in this BFAR, and will minimize the cost of litigation both for the Government and the Appellant, so that Appellant's business can be revived to carry on its crusading altruistic management in the national interest critically needed to help curb the current spiraling inflation.

"*PROLOGUE II-C"

Categorized Listing of Not-Yet Funded Tasks Performed by ODC Under Subject Contract:

Category A
Under GSFC's Task Curtailment Scheme

Task 1A Review of Bell Aero's PLACE System with PLACE-Vanguard Experiment & its Documentation (Suppl. Tab 23)

Task 1.5 Calibration (Suppl. Tab 4, p.1 & 3-5)

Task 1.7 Data Reduction (Suppl. Tab 4, p.1 & 3-5)

Task 1.8 Evaluation and Revision (Suppl. Tab 4, p.1 & 3-5)

Task 1.12 Improve Accuracy of LOCATE (Suppl. Tab 4, p.1 & 3-5)

Task 2.1 Control Software (Suppl. Tab 4, p.1 & 3-5)

Task 2.5 Simulation Tests (Suppl. Tab 4, p.1 & 3-5)

Task 3.1 Simulation Test Plan (Suppl. Tab 4, p.1 & 3-5)

Task 3.2 Simulation Software (Suppl. Tab 4, p.1 & 3-5)

Task 4.1 Test Plan (Suppl. Tab 4, p.1 & 3-5)

Task 5.1 Tests (Suppl. Tab 4, p.1 & 3-5)

Category B
Under GSFC Coercion and False Inducement

Task (i) ODC's Solo Symposium for GSFC to acquire Project funding (Suppl. Tab 3, p.6)

Task (ii) Design of ODC PLACE Software System Monitor, (as acknowledged in Suppl. Tab 19, p.1; but no contract stipulation or Adjudication as

evidenced in Suppl.Tab 4,p.1-2)

Task (iii) Improving Operating System (Suppl. Tab 4, p.7)

Task (iv) Recoding and Reprogramming for Minimizing Core Utilization (Suppl. Tab 4, p.7)

Task (v) Training of GSFC Monitor (T.O.) Mr. Brandel on ODC's PLACE Software System Operation and Design - far beyond contract specification.

Other Tasks: Numerous Minor tasks ordered verbally by T.O.

**Ground 1: Appeal Judge Being in Violation of Conflict of Interest Clause (p.I-1).

BEFORE THE
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION
BOARD OF CONTRACT APPEALS

Appeal of	)	NASA BCA
Optimal Data Corporation (ODC)	)	No. 986-8
Contract NAS 5-21941	)	

APPELLANT'S BRIEF FOR APPEAL RECONSIDERATION (ABFAR)

Table of Contents

Document		Page
Prologue	Opening Statements and Overview of ABFAR	p1-2
Book I	Grounds for Appeal Reconsideration	I1-9
Book II	Rebuttal of Appeal Judge's Findings of Fact (FOF)	II-1 to 55
Book III	Objections to Appeal Judge's Decisions	III-1 to 18
Book IV	Supplementary Supporting Documents	
	Part A-Appellant's Contentions & Proofs	IV-A-0
	Part B-Appellant's Debunking of GSFC's Allegations, with Corroborating Evidence and Proofs	IV-B-0
Summary	Summarization and Conclusions	S-1

Attachments

I	Definitions and Basic Formulae for O/H and G&A Rates	AI-1
II	Recapitulation of Funded and Not-yet Funded Costs/Tasks	AII-1
III	Highlights of Major Features of Subject Contract	AIII-1
IV	Acronyms and Abbreviations	AIV-1
V	Annotations Concerning Appeal File and Appeal File Supplements	AV-1

BEFORE THE
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION
BOARD OF CONTRACT APPEALS,
WASHINGTON, D.C.

Appeal of)
Optimal Data Corporation (ODC))
Contract NAS 5-21941)

Appeal began: July 1976
NASA BCA No. 976-8
Dated: January 22, 1980

APPEAL FOR RECTIFICATION OF APPEAL JUDGE'S DENIAL OF APPELLANT'S BFAR
(Brief for Appeal Reconsideration)

TABLE OF CONTENT

1. Conflict-of-interest Violation by Appeal Judge
1.1 Revealing of Violation and Objection of Defective Judgeship Prior to Decision
1.2 Crucial Evidence of Biased Influence on Defective Judgeship
1.3 Deficiency in Basic Requirement of Judgeship and Governmental Official's Conduct
2. Ample Evidence of Appeal Judge's Abuse in Instant Appeal
2.1 Evasion of Responding to Appellant's BFAR (Brief for Appeal Reconsideration) Attachment p-1 and p-2
2.2 Major Distortions and Biased Arguments by Appeal Judge in behalf of Respondent
2.3 Key Evidence and Proofs for Appellant Cause
3. Concluding Plea for Genuine Relief of the Crusading Altruistic Contractor

ODC Appeal-Re:NAS5-21941 / NASA BCA 976-8

APPELLANT'S BRIEF

TABLE OF CONTENTS

Section		Contents	Page
FOREWORD		Opening Statements and Overview of Brief (Acronyms & Abbrev. in Att. V)	F-1
1		Appellant's Contentions Regarding Itemized Claims	
	A.	Appellant's Contentions Regarding Itemized Claims I & II	1-1 to 1-3
	B.	Appellant's Contentions Regarding Itemized Claims III, IV & V	1-4 to 1-7
	C.	Summation of Claims	1-8
2		Appellant's Statement Re BCA-Designated Issues	
	A.	Appellant's Statements Regarding Issues of Fact A1 thru A12	2-1 to 2-28
	B.	Appellant's Statements Regarding Issues of Law B1 thru B8	2-29 to 2-40
	C.	Two Newly-raised Issues C1 thru C2	2-41 to 2-46
3		Appellant's Proof of Equitability and Special Merits of Claims	
3.1		Proof of Inequity and and Errors in DCAA Integrated O/H Rate	3-1 to 3-4
3.2		Proof of Special Merit of ODC Equitable O/H	3-5 to 3-6
4		Appellant's Proof of Extraordinary Efforts/ Performance	
4.1		Extraordinary Efforts	4-1

	Beyond Contractual Requirements	to 4-5
4.2	Extraordinary Performance Beyond Contractual Requirements	4-6 to 4-8
5	Unique Virtues of ODC's Altruistic Management	
5.1	ODC Inherent Non-profit Policy for Government Contracts	5-1 to 5-2
5.2	ODC Unusual Technical Conscientiousness and Cost Consciousness	5-3 to 5-6
5.3	Extraordinary and Unique Cost Control Instrument-- ODC's Provisional Contract Cost Data Sheet	5-7
6	Government's Unjust Treatment of ODC Under Subject Contract	
6.1	GSFC's Unjust Treatment of ODC	6-1 to 6-6
6.2	DCAA's Unjust Treatment of ODC	6-7 to 6-8
6.3	SBA's Unjust Treatment of ODC	6-9 to 6-13
SUMMARY	Summarization and Concluding Remarks	S-1 to S-3

ATTACHMENTS:

I	Definitions and Basic Formulae for O/H and G&A Rates	AI-1
II	Recapitulation of Funded and Not-yet Funded Costs/Tasks	AII-1
III	Highlight of Major Features of Subject Contract	AIII-1
IV	Annotation for Documents in Appeal File and Appeal Supplements	AIV-1
V	Acronyms and Abbreviations	AV-1

RE: NAS 5-21941 US Ct. Cl. 760-85C
Plaintiff Motion (NASA BCA No. 976-8)

PLAINTIFF REPLY BRIEF

TABLE OF CONTENT

Section	Title	Page
Table 1	Table of Acronyms & Abbrev.	(ii)
Table 2	Table of Case Citations	(iii)
Sect. 1	Evidential Support for Summary Judgement for Claimant by US Claims Court Rule 56	10
Sect. 2	Clarification and Rectification of Defendant's Brief in Nature of the case	
Sect. 3	Rectifications of Defendant's Statement of Fact	11
Sect. 4	Rebuttal of Defendant's Argument	
(i)	Response to Defendant's Alleged Inadequacy of Plaintiff's Brief in Support for Summary Judgement for Claimant	13
(a)	Response to Defendant's Alleged Plaintiff's Failure to Address NASA-BCA's Findings of Fact (FOF)	13
(b)	Response to Defendant's Alleged Plaintiff's Failure to Address NASA-BCA's Conclusion of Law	18
(c)	Reaffirming Substantiation for Plaintiff's Assertions of Fraud and Bad Faith by NASA-BCA, GSFC, DCAA	18-22
(ii)	Further substantiations for Optimal's Meritorious Claims	22-26
Sect. 5	Substantiated Resolutions for Questions Presented in Defendant's Brief	27-28
Sect. 6	Summarization and Conclusion	
(i)	Summarization	29
(ii)	Conclusion	30

IN THE UNITED STATES CLAIMS COURT

OPTIMAL DATA CORPORATION.	)	
	)	
Plaintiff,	)	
	)	
V.	)	
	)	
THE UNITED STATES	)	No. 760-85C
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF GENUINE AND MATERIAL FACTS UPON WHICH THE PARTIES CANNOT AGREE

Pursuant to the status conference held in this case on July 10, 1989, the Court's Order dated July 11, 1989, and the Court's prior Order dated October 31, 1988, the Plaintiff submits the following memorandum of genuine and material facts upon which the parties cannot agree: (Facts 1-44) P.P.1-36.

PLAINTIFF MOTION
Table of Content

Brief Section	Title/Description	Page #
Table 1	Table of Acronyms and Abbreviations	(ii)
Table 2	Table of Case Citations	(iii)
S 1	Legal Foundations for Plaintiff Motion	1
S 2	Special Ground for Plaintiff Motion	2
S 3	Legal Support for Instant Motion	4
S 4	Correspondence and Differentiation Between the two Versions of NASA-BCA Decision Summary	6
S 5	Plaintiff Specific Contentions - Substantiation in Analysis of Paragraph I of Published Version With Section 2 of Unpublished Version, As Shown Herein Below	8
S 6	Plaintiff Specific Contentions - Substantiation in Analysis of Paragraph II of Published Version With Section 3 of Unpublished Version, As Shown Herein below	17

S 7	Plaintiff Specific Contentions - Substantiation in Analysis of Paragraph IV of Published Version with Sections 4 & 5 of Unpublished Version, As Shown Herein below	21
S 8	Plaintiff Specific Contentions - Substantiation in Analysis of Paragraph III of Published Version with Sections 1 & 6 of Unpublished Version, As Shown Herein below	31
S 9	Correlations Between BCA Decision Issues and Plaintiff-Affiant Answers to BCA Designated Issues	33
S 10	Summarization and Conclusion	35-37

Appendix:

Item	Title/Description	App.#
1	Listing and Annotation of NASA-GSFC Appeal File (AF)	(j)
2	Listing and Annotation of ODC Supplementary File (SAF) Accompanied with Excerpt of SAF Tab. 1-32.....	(jj) 1-65
3	Excerpt of Appellant-Affiant Answers to NASA-BCA Designated Issues (Table of Content on App. 65A).....	66-101
4	Excerpt of Compendium of Prologues (I-A, B, C; II-A B, C; III-A, B, C, Table of Content on App.101A).....	102-119

Appeal CL Ct 760-85C
NAS 5-21941 (NASA-BCA No.976-8)

PLAINTIFF RESPONSE ON FINDINGS OF FACT

Topics	Description	PRP.#
FOREWORD	An Introduction to Plaintiff Response to Defendant's Draft of Stipulations with Submissions of NASA-BCA Findings of Fact(BCA-FOF)	(ii)
Part I.	MATERIAL FINDINGS OF FACT (MFOF)	
A.	Material Evidence for Misconduct and Conflict-of-Interest, in violation of Judicial Code of Ethics by NASA-BCA Judge Dicus	I1-2
B.	Corroborating Evidence of Distortion, Fabrication, Logical Misconception and Ill-Willed Arithmetic Errors in Findings of Fact, Rendering Unjust Decision with Bias, Prejudice, and Discrimination, advocating Government Fraud, Caprice, and Inequitable Treatment of Plaintiff, the Altruistic Minority Contractor.	I2-6
Part II.	PLAINTIFF TRUTHFUL FINDINGS OF FACT (PLT-TFOF) VS BCA FINDINGS OF FACT (BCA-FOF) 1-58 (FOF.5,6,11,22,38,43,	II1-58

45,48,56 ARE CONCURRED;
FOF.1,2,3,7-9,10,13,17,
19,25,26,28,36,44,46,47,
49,54,57,58 ARE CONCURRED
WITH CLARIFICATION AND/OR
COMMENTS; THE REST OF THE
58 FINDINGS OF FACT ARE
OFFERED RECTIFICATIONS
WITH TRUTHFUL FINDING OF
FACT (TFOF), CORRES-
PONDINGLY

Part III. A COMPENDIUM OF PROLOGUES (iii)
IN SUBSTANTIATION FOR
PART II. - PLAINTIFF
TRUTHFUL FINDING OF FACT
(PLT-TFOF)

FOREWORD THE PROLOGUE OF PROLOGUES

Prologue		Page#
IA	Chronological Events of NASA GSFC Project on Optimal's Real-Time PLACE Software System	IA-1 to 3
IB	Highlights of Major Features of Subject Project	IB-1
IC	Unique Virtues of ODC Altruistic Management	IC-1 to 5
IIA	GSFC PLACE Project Funding Status from 1971-1978	IIA-1
IIB	Recapitulation of Funded & Not-yet Funded Costs/Tasks for Project Phase I & II	IIB-1
IIC	Categorized Listing of Not-yet Funded Tasks Performed by ODC Under Subject Contract. Attachment: Clause 172 (g)	IIC-1

IIIA	Definitions and Basic Formulae for O/H and G&A Computations	IIIA-1
IIIB	Basic Truths Concerning cost Segregation	IIIB-1
IIIC	Rigorous Proof for Inequality With Errors in DCAA O/H Computation, and Equality with Merit in ODC O/H Computation	IIIC-1 to IIIC-3
Part IV.	Summarization and Conclusion	IV-1 to 4
APPENDIX	Appeal File (AF) Listing & Annotation, Tab.1-55 and Supplement Appeal File (SAF) Listing & Annotation, Tab.1-32	(j), (jj)& (jjj)

BRIEF FOR APPELLANT

Table of Content

Section	Description	Page#
Certificate	Certificate of Interest	(ii)
Statements	Statement of Jurisdiction and Related Cases	(iii)
Table 1	Table of Acronyms and Abbreviations	(iv)
Table 2	Table of Case Citations	(v)
Section I	Statement of the Case	
(a)	Preliminary Information	
(1)	Nature of the Case	1
(2)	Course of Proceedings	1
(3)	Its Disposition in U.S. Court of Claims	2
(b)	Special Grounds for Instant Appeal	2-7
Section II	Issues Presented for Review	
(a)	Statement of Issues	10
(b)	Appellant Resolution of Issues	11
Section III	Appellant's Truthful Findings of Fact (APLS-TFOF 1-58) In Response to BCA's Findings of Fact (BCA-FOF 1-58)	15

Section IV	Summary of Argument	
(a)	Material Facts in in Support of Instant Appeal	44
(b)	Legal Support for Instant Appeal	47
Section V	Summarization and Conclusion	49

Attachment		
(a)	Mandatory Items	MAP.1
(b)	Information for Special Attention	MAP.22
Appendix (separate binding)	Listing and Annotations for NASA-GSFC (Appellee) Appeal File (AF.#)	(j)
	Listing and Annotations for Optimal (Appellant) Supplemental Appeal File (SAF.#)	(jj)
	Appendices of Indexed Supplementary Appeal File (SAF.#)	App.1-119

REPLY BRIEF FOR APPELLANT

Table of Content

Section	Description	Page#
Certificate	Certificate of Interest	(iii)
Statements	Statement of Jurisdiction and Related Cases	(iii)
Table 1	Table of Acronyms and Abbreviations	(iv)
Table 2	Table of Case Citations	(v)
Foreword	Foreword Pleading	1
Section I	Preliminary Statements	1-2
(a)	Clarification of Appellee's Statement of the Issue	
(b)	Clarification of Appellee's Statement of the Case	
Section II	Rectifications of of Respondent's Statement of Facts, Course of Proceedings below (R-Brief,pp.2-6)	2-10
(a)	Rectification of Respondent's Adopted NASA-BCA "Factual Findings" (R-App.17-32) (R-Brief p.2-5)	
(b)	Rectifications of Respondent's Adopted NASA-BCA "Findings of Fact" in its Denials	

	of Optimal's Claims	
Section III	Substantial Debunking of Respondent's Argument	11-18
(a)	Substantiated Response to Respondent's Summary of Argument	
Section IV	Legal Support for Instant Appeal	19-22
(a)	Substantiated Response to Respondent's Standard of Review (R-Brief p.10)	
(b)	Specific Legal Support for Claims I-V	
(c)	Reaffirmation of Judicial Defectiveness of NASA-BCA Decision	
(d)	Obscurity and Errors of Lower Court in Affirming NASA-BCA's Decision	
Section V	Summarization and Conclusion	23-25
Attachment A	Extract of Previous Appeals T.O.C.	Attp1
Attachment B	Information for Special Attention	Attp3
Appendices	Listing and Annotations for NASA-GSFC (Appellee) Appeal File (AF.1-55)	(j)
	Listing and Annotations for Optimal's (Appellant's) Supplemental Appeal File (SAF.1-32)	(jj)
	Appendices of Indexed Supplementary Appeal File (SAF.1-32)	App.1-119

(Note: Submitted to Claims Court as: PLAINTIFF RESPONSE on Findings of Fact)

A RECAPITULATION OF PLAINTIFF'S TRUTHFUL FINDINGS OF FACT (TFOF)

CLARIFICATION/RECTIFICATION OF BCA DECISION (FOF.1-58)[1]

FOF.#	CLARIFICATION/RECTIFICATION
1.	Used "Reduction in Scope" to cover "Curtailment Scheme".
2.	Elaborated all Contract provisions, while omitting Clause 172 for Cost Reimbursement.
3-4	Adjudicated Funds for Tasks IA&IB, Curtailed Pre-requisite Task IA. Later called it an Overrun to deprive Fixed Fees, some still unpaid.
5	T.O. dictated all, playing the role of C.O.
7.	Main Task to Develop the Real

---

[1]NASA-BCA Decision, original complete copies are in Claims Ct. Clerk's Office File, Folder 4 of 16 (Dec. 13, 1978, Final Denial, Dec. 28, 1979); also published in Commerce Clearing House [14,225] 1980. A complete copy of this publication appeared in Appendix pp.10-40. Complete copies of Clarification and Rectification of BCA's FOF.1-58 submitted to BCA in Appellant Brief for Reconsideration, and submitted to Claims Ct., Plaintiff Response on FOF, and its revised version to Apls Ct-Fed, Brief for Appellant, pp.15-44.

time Software System belittled by Judge; Phase II tasks, T.O. adj. $200,800, then, down to $99,610 under Curtailment Scheme again, suffering funding gaps.

9-13 NASA-WFC on-site service contract pre-award audit, DCAA instructed separation of O/H as a mandate. Judge advocated DCAA's fraudulent report and illegal submission of O/H computation with its recomputed integrated inequitable O/H rate, defying its own instruction capriciously and with gross error in putting O/H labor into direct labor base.

14. DCAA Auditors, Gallimore, Haley and Walker, often used Teng in lieu of ODC, precipitating minority personal prejudice, at WFC proposal time, ODC had only 1-pool O/H which, as Judge insinuated, precludes ODC from using 2-pool O/H regardless of equitability principle.

15. Judge called CPA Thrailkill's Memo "ODC accountant Thrailkill's letter" to hide the legal validity. "DCAA instructed O/H separation" - before uncovering DCAA's concealed report, which was never issued to ODC, but to all other contractors -- a discrimination!

16-18 Judge distorted WFC proj. deficit by using ceiling amount of Fixed Rate contract as Fixed Price contract amount, in lieu of contract revenue. Judge tortuously

asserted: 1/. DCAA instruction on O/H separation was for implementation prior to contract award not post contract award. 2/. Negotiation on 1-single co-wide pool. 3/. ODC's Claim all due to Appellant's misunderstanding, whereas DCAA instruction specifically stated "O/H separation, if on-site contract awarded".

19-20 T.O. Brandel revealed GSFC's difficulty in Minority Contract Funding, threatened "Stop Work". Illogical LOCC requirement on the earlier adjudicated tasks/funds. Optimal gave notice of $540,000 in total.

21. On Mod.5, Training was stipulated for NASA Rosman station personnel to learn to use ODC's Real-time Software System. T.O. Brandel misrepresented himself to take the Training and coerced ODC project personnel for the System Design info - breaching Contract and deprived ODC's proprietary, Judge advocated these illegal actions by rewording "Training for Respondent personnel" to hide Brandel's breach of contract.

23-24 Records: Time cards in Home ofc to process paychecks, unduly criticized proj. ofc. All vouchers submitted together w/CCD, the unique cost report instrument. But Judge disregarded, esp. in reference w/ Vchr 33&34. Judge even mentioned a non-existent "Vchr 34" to divert true Vchr 34.

25. Responding to ODC's Ltr to GSFC SMB, Dr. Wolter, GSFC held mtgs June 20, 1975 re payment. Judge evasive on allegation of Brandel's direct dealing w/ODC's Dr. Vande Linde, key personnel. (Judge Dicus, as legal counsel, had attended such mtgs, as remembered by Dr. Wolter.)

26. GSFC ignored its SM specialist Dr. Wolter while requesting SBA and price analyst's assistance, commending ODC. GSFC Keefe wrote SBA, requesting a decision in GSFC's favor, as advocated by Judge. SBA sent SET to audit ODC, is critical of DCAA's fraud and errors. SBA, ironically ignores SET's report.

30. Waiving LOC which was invalid for all cost adjudicated earlier. GSFC deputy director waived LOC requirement, which Judge Dicus prejudicially imposed on Optimal (with the $540,000 fund adjudicated and which Optimal gave notice of).

31. DCAA completed auditing, made adjustment on O/H rate from 168% to 145.7% with CPA, under influence of GSFC, went to recompute into the inequitable integrated rate with gross error, resulting in 50.2%. The error was by treating O/H Labor into direct Labor base, maliciously defying ODC's truly equitable O/H rate of 145.7%, which DCAA adjusted to.

32. Judge Dicus committed a three-fold compounded error in his elementary arithmetic by including O/H in the base Optimal drive G&A rate up (down); Optimal's altruistic formula is excluding O/H from base, yielding relatively higher rate, while applying to small base, one gets less billing to gov't. Optimal always compared the two results and bills the one in best interest to gov't. Judge Dicus, with superior knowledge, commonly committed such errors by prejudicial sense of direction.

33-34 Dispute on O/H claim using DCAA's capricious and erroneous computation self-debunked in preceding parags.(31-32), deserving no more explanation. Counter-claim of $19,063, as diff. of O/H expenses, based on DCAA's capricious and erroneous computation as presented in DCAA fraudulent reports.

35. For 1973, on-site & off-site portions have only trivial diff., hence unfeasible to separate into 2-pools. Judge wanted to force ODC into same as 1973 regardless of equitability as mandated in NSPR15, which was capriciously cited by Judge in FOF 58.

36. For 1974, DCAA calculated on-site vs. off-site 145.7% & 86% implying the urgency of separation to attain equitability.

37. DCAA completed audit of ODC's sep-

arated accounting of cost, as in DCAA's "Summary Account by Projects".

38-39 SBA commissioned SET auditing rpt, saying ODC cost had been well separated, DCAA's integrated rate is mixing oranges and apples. SET's recommending reimbursement for ODC's claim was not accepted by SBA under SBA-DCAA-GSFC massive collusion.

40-41 Judge created numerous new issues, i.e., re Voucher 33, Dr. Samant's work hrs., never an issue before, questioned by Judge because a billing period must include those hrs. in funding gaps. Judge also mentioned another "Vchr 34" which was never identified, in fact, non-existing, just to confuse with the only true Vchr 34.

42-43 Same issues as w/resolutions in parags. FOF32-34. Indeed, DCAA after completion of auditing w/o questions on O/H separation in mtgs. w/SBA designated Auditor, SET.

44-48 ODC's cost itemization code and computerized Acctg System show segregation of on-site/off-site operations, & for different projects, even for different items of costs w/sub-items. BCA Judge created more new issues, re complaints III-V as added claims after Final Decision. This is Judge 's wild creation in behest of Appellee who considered complaints

I-V based on Vchr 33,34...37 respectively and made only one final decision. Judge misconstrued Dr. Teng's pledges, as "alleges", "Vchr 37, direct labor was never billed or charged before". Judge further misconstrued as "Dr. Teng never charged direct labor on this project before" to infer that Dr. Teng, as ODC's pres., his direct labor can't be charged-Judge's misconstrued are really tortuous and his denial of Dr. Teng's minimum wage earnings is cruel injustice for his tasks were specifically described in 7 categories at self-sacrificed minimum rate.

49. Judge also critical of Dr. Samant and Dr. Loh's time charges: Time cards submitted 2 times after auditing response to GSFC Keefe's request (illegal action), the "Auditor/Judge" demands too. The tab., based on time cards, also listed nbr. of hrs. charged to Direct Labor, O/H and hrs. contributed w/o charging, but Judge suspect over-lapping hrs., and disbelieves ODC's altruistic mgmt. Dr. Loh & Dr. Samant's hr. rate was $7.00-$7.50, annual earnings $14,500-$15,500, for weekend, holidays, & night work, inc. O/T contributions.

50. Re Ford Torino rent, Judge sought rental agreement as evidence which had been in T.O.'s file during approving time. Request can easily be furnished, but never mentioned before Judge's decision. If Judge

were fair, he would first ask for such evidence to help expedite reimbursement.

51-53 Judge advocated use of 50.2%, which Judge knew was not provisional rate, erroneous & inequitable, breaching contract. Judge advocated all.

54-55 Re Complaint V of Claim $18,029, for meritoriously constructive change, evidenced by T.O. Wishna's handwritten adj. For this T.O. adj. cost for spec. task well done, Judge still criticizing ODC lack of proposal which was submitted long before his adj. of cost.

56. Dr. Teng's Dec. 5, 1973 ltr. re Sept. mtg on Proj. Funding Problem w/loud cry for funding (adjudicated $540,000). But Judge regards record silent, respecting "overrun". C.O. Wessel revealed roots of T.O. Wishna's government control of contract.

57. Appellant's progress rpts. & funding status depicts major funding gaps, tho no narrative description of ODC's struggling for technical work accomplishment & at same time crying for surviving funding in vain - As Dir., Dr. Teng deintensified GSFC's true funding difficulties from proj. personnel to prevent low morale which would leave ODC in status of non-delivvery of end product.

58. Judge's lengthy citation of NASPR

15.201-3,4; & 203 on Indirect cost, while ignoring mandatory requirement for identif. & segregation of costs deemed efficient & necessary for maintaining equitability, as delineated in Plaintiff's Prologues III A,B,C, and substantiated by categorized pleadings in Prologues IA,B,C.

Optimal's Petition
Re:NAS 5-21941

USSC:_____
Apls. Ct-Fed.91-5070
US CL. CT. #760-85C
NASA-BCA NO 976-8

PETITION FOR WRIT OF CERTIORARI
CERTIFICATE OF SERVICE

This is to certify that in compliance with the directive of February 12, 1992 from the USSC Clerk's Office, the undersigned, on this 29th day of February 1992, mailed (1) copy of the foregoing Petition with Appendix to the following:

1. Office of the Solicitor General
   Department of Justice
   Washington D.C. 20530

2. Paul Langer, Esq., Appellee Counsel
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Signed _____

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